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FEDERAL ANTI-TRUST POLICY

by

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(A.B., Boston College, 1935)

In partial fulfillment of the requirements
for the degree of Master of Business
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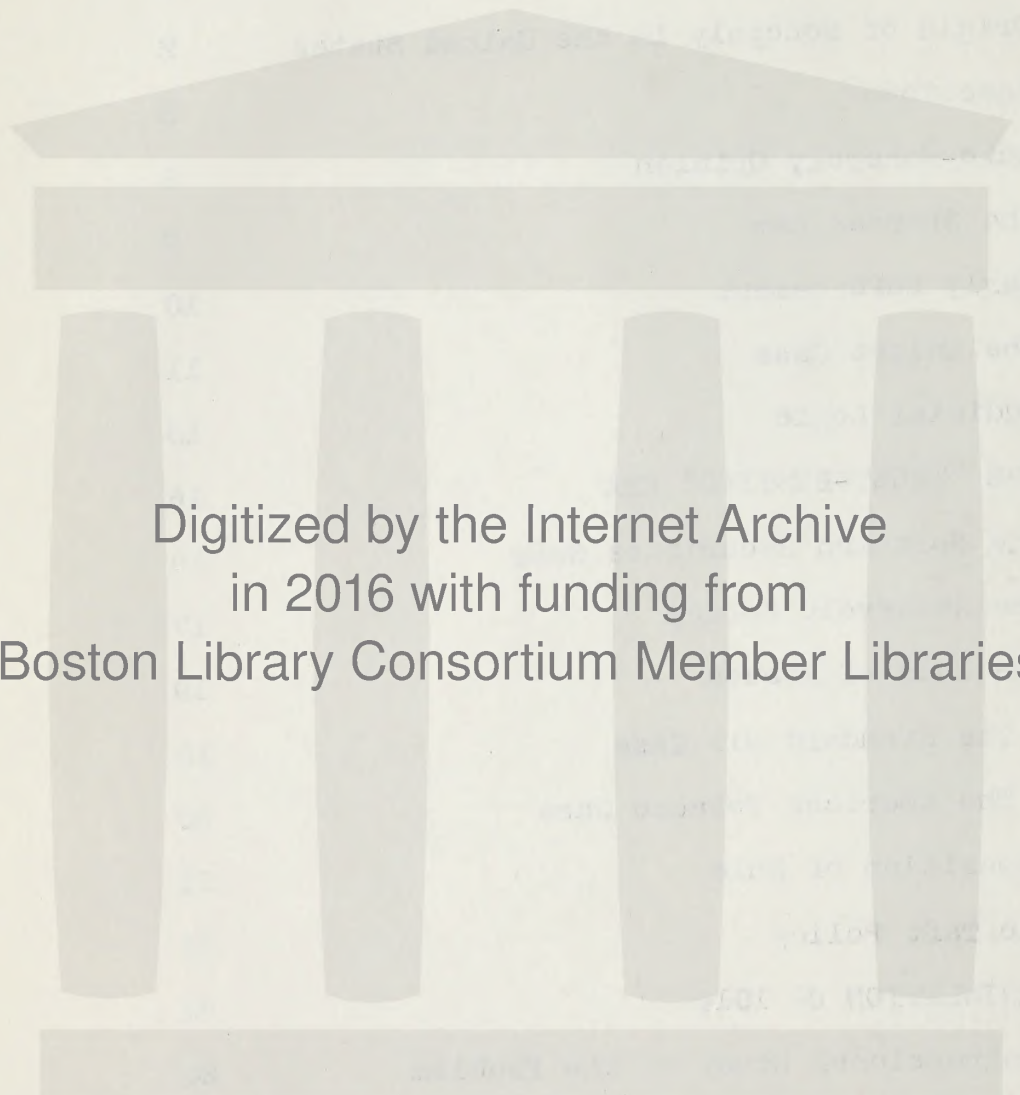
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CONTENTS

CHAPTER

PAGE

I	EARLY HISTORY	1
	Theory of Monopoly	1
	Origin of Monopoly in the United States	2
	Reactions	3
	Auto-Monopoly Opinion	6
	The Sherman Law	9
	Early Enforcement	10
	The Knight Case	11
	Judicial Logic	13
II	THE "TRUST-BUSTING" ERA	16
	The Northern Securities Case	16
	The Roosevelt Policy	17
	The Rule of Reason	19
	The Standard Oil Case	19
	The American Tobacco Case	20
	Exposition of Rule	21
	The Taft Policy	22
III	LEGISLATION OF 1914	24
	Congressional Study of the Problem	24
	The Wilson Policy	25
	Background of Legislation	26
	Federal Trade Commission Act	28
	The Clayton Act	29
	Legal Innovations	31



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IV	MODIFICATIONS OF THE STATUS OF THE FEDERAL TRADE COMMISSION	35
	Procedure	35
	Stipulations	42
	Legal Powers of the Commission	43
	Legal Limitations of the Commission	44
	Status with courts	45
	The Warren Case	47
	The Curtis Publishing Case	48
	The Klesner Case	49
	The Raladam Case	50
V	THE FEDERAL TRADE COMMISSION AND UNFAIR BUSINESS PRACTICE	52
	Misrepresentation	52
	Misbranding	55
	"Passing-Off"	56
	Disparagement of Competitors	58
	Secret Commissions	60
	Miscellaneous Cases	62
VI	THE COOPERATIVE TREND IN AMERICAN BUSINESS	64
	Trade Associations	64
	Legal Status	65
	Trends	67
	Trade Practice Conferences	69
VII	RECENT LEGISLATIVE TRENDS	72
	The Export Trade Act	72
	The Packers and Stockyards Act	73
	The Capper-Volstead Act	75

	The National Industrial Recovery Act	75
	The Robinson-Patman Act	76
	The Miller-Tydings Act	77
	The Wheeler-Lea Act	77
VIII	THE FEDERAL TRADE COMMISSION AND MONOPOLISTIC PRACTICES	79
	Unfair Price Practices	79
	Price Discriminations	80
	Allowance Discriminations	82
	Economic Aspects of Discrimination	85
	Brokerage Allowances	87
	The Goodyear Case	88
	The Status of the "Small" Independent	96
	Resale Price Maintenance and "Loss-leader" selling	98
	Legal background	99
	The "Fair Trade" Movement	103
	Present Legal Status	104
	Trends	105
	Forces Supporting Legislation	108
	Tieing Contracts	110
	Patents	111
	Exclusive Dealing Contracts	114
	Basing Point System	116
IX	STATUS OF ANTI-TRUST POLICY	119
	Concentration in American Industry	119
	Factors in Concentration	122
	Reports of the Department of Justice	124
	Conclusion	127

I. EARLY HISTORY

Theory of Monopoly

Orthodox economic theory has long held to certain fundamentals concerning the determination of price. The conception maintains that in every economic process there exists opposing forces which limit each other, and at some point reach a condition of complete counterpoise. This point of stable equilibrium is not often predeterminable, but this is due to lack of knowledge of the specific conditions. Moreover the adjustment seldom remains fixed for long, but an equilibrium is continually tending to be re-established. The theory holds that the conflicting forces of demand and supply playing in an interdependent market produce the point of equilibrium, and that the balance is affected by adjustment of these forces in any section of the market.

Various factors have tended to modify this theory. Thus the increasing size of units has so far reduced their number in most fields of production that spontaneous adjustment of supply and demand through the independent actions of various producers, is rarely the case. Numerous controls have been established which preclude many of the elements which actual competition demands and which "equilibrium" economics presupposes. Thus the direction of demand, the distribution of resources among industries and even the levels of incomes, are now substantially determined by the deliberate calculated

decisions of individuals or groups of individuals, in whom happens to be vested the power of management of modern business.

The elasticity of the word "monopoly" has always been a source of difficulty to economists, courts and lawmakers. In a broad sense it may be held to signify "any such control---as enables the one having such control to raise the price---materially above the price fixed by free competition."¹

One Court has seen fit to define monopoly as "the sole power - or a power largely in excess of that possessed by others - of dealing in some particular commodity, or at some particular market or place, or of carrying on some particular business."²

A recent discussion says in part, "its (monopolies) symptoms are as various as economic activity. In one situation monopoly causes rigid prices, unchanging month after month. In other instances prices fluctuate up and down at the whim of the monopolist to maximize net profits. In other instances production is sharply curtailed, whereas simultaneously in another industry production may be on an even keel, because the monopolist knows that in the long run he can exact his price. In the abstract it can only be said that the word represents the antithesis of our competitive ideals."³

Origin of Monopoly in the United States

The monopolistic tendency in American industry had its discernible beginnings in the decade following the Civil

1. Webster's International Dictionary, 1913.

2. U.S. vs. American Naval Stores Co., 172 Fed. 455.

3. Thurman Arnold (ass't attorney general) on "What is Monopoly?" delivered before the Advertising Federation of America, Detroit, June 15, 1938. (Vital Speeches, July 1, 1938.)

War, and waxed strong during the latter half of the nineteenth century. Growth of large scale industries producing relatively standardized products had been the logical effect of the discovery of steam. Concurrently with the integration of industry, and perhaps as a necessary by-product, was the tendency towards monopolistic practices, primarily in agreements or "pools" limiting production, price fixing, centralizing selling and allocating quotas. Many key industries such as salt, cordage, gunpowder, sugar refining, coal mining, oil refining, and various branches of the iron and steel industries had these agreements. The growing importance of fixed capital investment and the instability of prices and of general economic activity were motivating factors in these tendencies.

Agreements, whether merely word of mouth, or solemnly attested documents were generally unsuccessful, breaking down because of the human element involved. These agreements, invalid by common law principles, and unenforceable as contracts, depended for their efficacy on the moral bonds of the "gentlemen's" agreements and invariably failed because of the naturally strong competitive instincts of the American businessman. Moreover they were subject to common law prosecution of conspiracy. It was less to avoid the ban of law however, than to offset the centrifugal forces of self-interest that businessmen and their lawyers sought a more binding form of organization.

The first great monopolist was the Standard Oil Company. Under the guidance of the "first corporation lawyer", Samuel C. T. Dodd, stockholders of some various thirty-nine companies delivered their stock, with permanent and irrevocable power of attorney to a board of trustees, of whom two were John D. Rockefeller and his brother William. The trustees managed the companies as a single unit and distributed the profits on a pro rata basis. Hence control was established over all the underlying companies, although they maintained their respective identities.¹

This pattern was closely followed by other industries, such as whiskey, white lead and sugar. The Sugar Refineries Company--known later as the American Sugar Company--took in eighteen refineries, immediately closed down eleven, and raised the margin between crude and refined sugar from a competitive .787 cents in 1887, to a monopolistic 1.258 cents in 1888.²

Reactions

Public opinion, aroused by the bludgeoning tactics of the trusts as well perhaps, by an instinctive distrust of such concentrations of wealth, which was taking place to the alleged disadvantage of both the consumer and the small producer, was reflected by the passage within the years 1889 and 1893 of anti-combination laws by sixteen State Legislatures,

1. "Our Times"--Mark Sullivan, Vol. Two--pgs. 236-337.

2. "The Trust Problem"--Jenks and Clark--Appendix D-2 pg. 343.

The first great monopolist was the Standard Oil

Company. Under the guidance of the "Trust" Corporation
"Trust", Samuel G. T. Paine, a descendant of some various
thirty-nine companies delivered their assets, with permanent
and irrevocable power of attorney as a basis of trust.
of whom two were John D. Rockefeller and his brother William.
The trustees managed the companies as a single unit and dis-
tributed the profits on a pro rata basis. These companies were
established over all the industrial enterprises, although they
maintained their respective identities.

This pattern was closely followed by other trusts.

Trusts, such as railroad, utility and sugar. The sugar
trusts Company--known later as the American Sugar Company--
took in eighteen railroads, immediately closed down eleven,
and raised the margin between crude oil refined sugar from a
competitive .75¢ cents in 1887, to a monopolistic 1.25¢ cents

in 1895.

Monopoly

Public opinion, aroused by the monopolizing tactics

of the trusts as well perhaps, by an instinctive distrust of
such concentrations of wealth, which was taking place to the
alleged disadvantage of both the consumer and the small pro-
ducer, was reflected by the passage within the years 1890 and
1895 of anti-trust legislation.

-
1. "Our Place"--John William, Vol. Two--pp. 235-237.
 2. "The Trust Problem"--James and Clara--Appendix B--pp. 241.

as well also by Federal action.

In the meanwhile the trust form of organization was being judicially outlawed through the application of common law principles. The New York and Ohio State Courts held this form to be illegal mainly on the grounds that entrance into such an association by corporations, even although carried out by privated stock transactions, was a corporate act exceeding of its powers ("ultra vires"), justifying forfeiture of its charter; moreover the courts declared "trust agreements...tending as they do to the creation of a monopoly, are also against public policy, and therefore contrary to law."¹⁻² With the trust form outlawed, the trusts dissolved into communities of interest, based on interlocking stock ownership described as "purely informal harmony".

Meantime the State of New Jersey voluntarily assumed a policy that was in sharp contrast to that of the majority of the other states. The general corporation laws of New Jersey of 1888 (amended twice in the following four years) allowed corporations to be organized with the widest latitude in defining their own powers and gave full sanction for the acquisition of stock in other corporations.³ Thus the opening was made for holding companies, which could control subsidiaries by getting control over their physical plants, or more simply, control over a sufficient share of their stock. Thence to New Jersey went the former trusts.

This New Jersey relaxation of corporation laws, to-

1. People vs. North River Refining Co., New York State, 1891.

2. State ex rel vs. Standard Oil Co., 49 Ohio State, 1892.

3. "Our Times" --Op. Cit. Pages, 329-337

In the meantime the first form of organization was being tentatively outlined through the application of common law principles. The New York and other courts have been slow to be liberal in their attitude on the grounds that such an association of corporations, even although arising out of private stock investments, was a corporation not exceeding the powers ("ultra vires"). Justifying limitations of the charter, however, the courts declared "other agreements" as being in fact to the creation of a company, and also against public policy, and therefore contrary to law. With the time being wasted, the stockholders turned into committees of interest, and on the following state concerning described as "gently informal harmony". Meeting the time of the New Jersey voluntarily occurred applying that was in many respects the state of the affairs of the other states. The general corporation laws of New Jersey of 1895 (amended since in the following four years) allowed corporations to be organized with the widest latitude in their own affairs and gave full authority for the acquisition of stock in other corporations. The New Jersey law was for holding companies, which could control subsidiaries by owning enough over their capital stock, or even simply, control over a sufficient share of their stock. Towards the New Jersey was the former state.

This New Jersey relaxation of corporation laws, the

1. People v. New York State Building Co., New York State, 1891.
2. State ex rel. vs. Standard Oil Co., 13 Ohio State, 1892.
3. "The Times", --02, Oct. 1892, pages 322-323.

gether with the widespread legal belief in the unassailability of the holding company device resulted in intensive increase in the combination trends. "In the three years preceding 1901 --the year of high tide for holding companies--one hundred and eighty three were organized, making in all a total capitalization of over four billions of dollars, one-twentieth of the total wealth of the United States, nearly twice the amount of money in circulation in the country, and more than four times the capitalization of all the manufacturing consolidations organized between 1860 and 1893.¹

Auto Monopoly Opinion

On December 4, 1889 Senator John Sherman of Ohio introduced a bill entitled "A bill to declare unlawful, trusts and combinations in restraint of trade and production." The philosophy underlying the proposal may be best understood from the words of Senator Sherman;²

"It's (trusts) governing motive is to increase the profits of the parties composing it.

"The law of selfishness uncontrolled by competition, compels it to disregard the interest of the consumer. It dictates terms to the transportation companies. It commands the price of labor without fear of strikes, for in its field it allows no competitors. Such a combination is far more dangerous than any hitherto invented,...it is...injurious to the public, and by the rule of both the common law the civil law is null and void and the just subject of restraint by the courts;...and the individuals engaged in it should be punished as criminals.

"...If the concentrated powers of this combination are entrusted to a single man, it is a kingly prerogative, incon-

1. Gilbert H. Montague - Trusts of Today - Page 46

2. (Compare with " When prices are set by a group which dominates the market, the only difference between such prices and taxes is the fact that such prices are levied without public responsibility or public control, and that their proceeds are used for privated...purposes."

-Thurman Arnold, U. S. Law Review, May-1938)

rather with the widespread feeling in the country that the
of the building company device resulting in excessive increase
in the construction period. In the three years preceding 1901
--the year of high tide for building construction--the number had
eighty three were permitted, making in all a total of 1,113
tion of over four millions of dollars, notwithstanding of the
total result of the United States, nearly triple the amount of
money is invested in the country, and more than four times
the capitalization of all the corporations consolidated or-
ganized between 1890 and 1901.

Anti Monopoly Legislation

On December 4, 1890 Senator John Sherman of Ohio
introduced a bill entitled "A bill to regulate railroads, rivers
and navigation in restraint of trade and monopoly." The
philosophy underlying the proposal may be best understood from
the words of Senator Sherman:

"It is (Senator) Sherman's motive is to increase the
profits of the nation by regulating the
"The law of self-interest controlled by competition
controls it as a principle and the interest of the nation. It dis-
cusses terms to the transportation companies. It demands the
price of lower rates for the benefit of the public. It is a
bill to regulate the railroads. It is a bill to regulate the
one that any business is concerned. It is a bill to regulate the
public, and by the rule of the nation is the civil law
is null and void and the subject of regulation is the
country. The individual is engaged in it and it is a business
of the nation."

"...If you concentrated power in the hands of
one individual, it is a single man, it is a single man, it is a
single man."

I. Oliver S. Monaghan - Trusts of Today - Page 48
"Monopoly with" when prices are set by a group which dominates
the market, the only difference between such prices and those
is the fact that such prices are levied without public response
either on public control, and that their proceeds are paid for
purposes... purposes."
-Thurman Arnold, F. E. C. Law Review, May-June 1933

sistent with our form of government, and should be subject to the strong resistance of the state of national authorities. If we will not endure a king as a political power, we should not endure a king over the production, transportation and sale of any of the necessities of life. If we should not submit to an emperor, we should not submit to an autocrat of trade, with power to prevent competition, and to fix the prices of any commodity..

"Now, Mr. President, what is this bill? A remedial statute to enforce, by civil process in the courts of the United States, the common law against monopolies...

"These trusts..are great wrongs to the people. They have invaded many of the most important branches of business. They operate with a double edged sword. They increase beyond reason the cost of the necessities of life and business, and they decrease the cost of the raw material, the farm products of the country. They regulate prices at their will, depress the price of what they buy, and increase the price of what they sell. They (trusts) pursue unmolested, unrestrained by law, their ceaseless round of speculation,...till they are fast producing that condition of our people in which the great mass of them are servitors of those which have aggregated wealth at their command".¹

Senator Sherman then argued that his bill was constitutional, being based on the commerce clause of the Constitution, which provides that "Congress shall have the power to regulate commerce with foreign nations and among the several States.." Pleading for a broad interpretation of this clause, he concluded, "While we should not stretch the powers granted to Congress by strained construction, we cannot surrender any of them; they are not ours to surrender; but whenever occasion calls we should exercise them for the benefit and protection of the people of the United States...I feel that it's (the bills) best effect will be the warning that all trade and commerce,... all struggles for money and property, must be governed by the universal law that the public good must be the test for all".²

After months of debate and discussion a substitute

1. "History of The Sherman Law of the United State of America"
Albert H. Walker. Pages 1-16

2. "History of the Sherman Law" - A. H. Walker, Pages 1-46
Op. Cit.

bill was drafted by Senator Hoar of Massachusetts and submitted April 8, 1890. It is interesting to note that most of the debate centered on the probable constitutionality of the bill rather than economic aspects involved. The basic theories of Senator Sherman and his contemporaries ran thus; "the natural competition of increasing production, the lowering of prices by such competition;" in other words, with ever-growing productive capacities, and ever-increasing economies in manufacturing and distributing costs, the attempt of every producer to market his goods at the expense of his competitors would eventually lead to a lowering of prices charged to consumers.¹ This lower price scale was of direct and visible benefit to the consuming public, and Congress undertook to insure this policy, rather than a "laissez faire" attitude which would permit business men to be the final arbiters of policy, fearing that many would incline toward the policy of narrower markets and more stable profits.

A survey of the Congressional discussion of the bill shows that the picture was drawn in "Black and White". Thus countervailing factors such as the effects of unrestrained competition, over-production, and the elimination of all but the financially strong, were given little or no thought.

At any rate the Hoar substitute bill narrowed the scope of aims from the original proposal of outlawing trusts "in restraint of trade and production" to the protection of "trade and commerce against unlawful restraints and monopolies", since the right to so regulate rested for its constitutionality on the "Commerce Clause."

1. Walker--Page 34 - ibid.

This Hoar Bill carrying the name of the author of the original act--Sherman--was passed by the House, June 20, 1890 by a vote of 242 ayes and no nays; by the Senate by a vote of 52 ayes and one nay, which negative vote was cast by the "undistinguished" Senator Blodgett from New Jersey, who had taken no part in the debate and who gave no reason for his vote.

President Harrison, on July 2, 1890, approved and signed Senate Bill No. 1, namely "An Act to protect trade and commerce against unlawful restraints and monopolies".

The Sherman Law

The Sherman statute is divided into eight sections:

1. "Every contract, combination...or conspiracy , in restraint of trade of commerce among the several States or among foreign nations, is hereby declared to be illegal...Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a misdemeanor, and on conviction thereof, shall be punished by a fine not exceeding \$5,000, or by imprisonment not exceeding one year, or by both...
2. "Every person who shall monopolize, or attempt to monopolize ...trade or commerce...shall be deemed guilty of a misdemeanor, and, on conviction thereof shall be punished by fine...or imprisonment...or both.
3. Reiterates Section 1.
4. "The several circuit courts of the United States are invested with jurisdiction to restrict and prevent violations...; it shall be the duty of the several district attorneys..under the direction of the Attorney General, to institute proceedings in equity to prevent...violations.
5. "...the court may cause them (interested parties) to be summoned.
6. "Any property owned (by violators) shall be forfeited to the United States and may be seized...

1. Act of March 3, 1911, c. 231, 36 Stat. 1167 abolished the circuit courts referred to, and conferred their powers upon the district courts.

7. "Any person who shall be injured,...may sue therefor,...and shall recover three-fold the damages...sustained, and the costs of suit.
8. "...the word 'person'...shall included corporations and associations."

Early Enforcement

After the Act was once passed, Congress and the general public seem to have lost all interest in it for at least a decade. During the remaining thirty two months of Harrison's administration, only five cases were tried, four of them resulting in failures, the only success being in the case of a coal combination whose tactics were so blatantly in opposition to the public welfare that any other verdict would have been a practical impossibility. Three cases of private litigation were brought up, with none of them having an affirmative result.¹

Although Section Four of the Sherman Law made it the duty of the Attorney General "to institute proceedings in equity to restrain all violations" of the law, and although the law was undeniably being violated by many combinations acting in restraint of trade, throughout the thirty two months of Harrison's administration, his Attorney General, H. A. Miller did not even mention the subject of that statute in his annual reports of 1890-91. He gave a one page notice to it in 1892.

One of the most important features of the cases instituted under the Harrison administration was the application of the Sherman Law to labor organizations. Thus striking ware-

housemen in New Orleans were enjoined by the federal district court for their interference with interstate commerce, this judgement being sustained by the circuit Court of Appeals.

This application of the Sherman Law to labor organizations became very noticeable during the Cleveland administration, since of the ten cases prosecuted by the Government on behalf of the United States for violation of the Act, no less than five were brought against men as alleged participants in labor strikes. Four of these were successful in the sense that these strikes were held to be restraints of trade. Moreover of the eight cases of private litigation the only two which had affirmative results were both in railroad labor strike cases.

Naturally perhaps, considerable indignation from labor and other circles was directed towards the courts for what was termed perversion of the purpose of the Act. However this tendency should not be blamed on the courts, since it was one of the inevitable by-products of the broad terms in the Sherman bill itself, in its prohibition of all agreements in restraint of competition. The sponsors of the bill had apparently given little or no thought to such a possible construction, and had made no proviso exempting combinations of labor.

The Knight Case

Early in the Cleveland administration was the famous Knight Case; where the Government sought an injunction against a sugar combination producing 98% of all the sugar refined in the United States.¹ The bill was based on the fact that the

¹U. S. vs. E. C. Knight Co. et al., 60 Fed. Rep. 306-934; and 151 U. S. 1 (1893)

American Sugar Refining Co., producing about 65% of the refined sugar produced in the country had purchased all the stock of the E. C. Knight Co. and of three other Pennsylvania corporations, all of which had been engaged in the refining of sugar in Philadelphia, where they produced about 33% of all sugar produced here. The Supreme Court opinion, delivered January 1895, denied the Government's plea, drawing a distinction between manufacture and commerce; manufacture being necessarily localized was not considered an interstate transaction and hence beyond the powers of the federal government to regulate.

The Court stated; "the contracts and acts of the defendants related exclusively to the acquisition of the Philadelphia refineries and the business of sugar refining in Philadelphia, and bore no relation to commerce between the States... It does not follow that an attempt to...to monopolize...the manufacture...was an attempt,..to monopolize commerce even though in order to dispose of the product, the instrumentality of commerce was necessarily invoked."

This Knight decision marked the undoubted low point in the enforcement history of the Sherman Law, and was believed by many legal minds to be fatal to federal control of industrial combinations. The Attorney General, December 1895, in answer to a House resolution calling upon him for a report of his efforts to enforce the antitrust laws, reported that the construction placed upon the act by the Knight case decision, "removed manufacturers and producers of every class from the operation of the law."¹ He then proceeded to recommend action by the State Legislatures.

"The effect of the decision in the Knight case upon the popular mind, and indeed upon Congress as well, was to discourage hope that the statute could be used to accomplish its

1. Exec. Doc. No. 234, 54th Cong., First Session.

manifest purpose and curb the great industrial trust, which... were making every effort to restrict production, control prices, and monopolize the business."¹

While the very narrow interpretation of the "commerce clause" by the Court seemed to preclude any possibility of federal action, it has been pointed out that the true cause of the defeat of the Government, was its poorly prepared case.

"No direct evidence that the sale of sugar across State lines, and the control of the business of such sales and of prices, were the chief object of the combination, was submitted to the court; although these facts must have been easily capable of proof."²

Judicial Logic

The early enforcement of the Sherman Act was undoubtedly greatly handicapped by both the vagueness of terms in the Act itself, and secondly that there was no formal exposition of the Act. Thus no publications were issued explaining the principles, meanings or practical working of the Law by its authors. Nothing comparable to the "Federalist" writings of Hamilton, Madison or Jay which served as guiding posts in the early days of the Constitution, appeared until Tafts authoritative book in 1913.³

However the Government won two important cases against railroad associations, in which the Court gave literal enforcement to the provisions of the Sherman Law. Both were cases of almost identical principles but were significant in that much discussion concerned the "reasonableness" of restraints. In the Trans Missouri case the majority (5-4) opinion stated "the plain and ordinary meaning of such language (i.e. of the law) is not limited to that kind of contract alone which is in unreasonable restraint of trade, but all contracts are included in such language, and no exceptions or limitations can be added without placing in the act that which was omitted by Congress...If the act ought to be read as contended for by the defendants (i.e. that only unreasonable restraints were illegal), Congress is the body to amend it and not

1. "The Anti-Trust Act and the Supreme Court" Wm. Howard Taft, pg. 60.

2. Ibid.

this court, by a process of judicial legislation, wholly unjustifiable."¹

In the Joint Traffic case soon afterwards, however, the court excluded from the operation of the statute all restraints which would be reasonable at common law.²

The most renowned victory during the McKinley administration was the Addyston Pipe Case. The government bill of complaint struck at a contract existing between various manufacturing companies in iron pipe, who although retaining separate corporate lives, through secret bids, freight rates and allocation of markets, maintained prices and shared profits. The Circuit Court, later upheld by the Supreme Court, decided that this contract existing between the defendants "however reasonable the prices they fixed, however great the competition they had to encounter, and however great the necessity for curbing themselves by joint agreement from committing financial suicide by ill-advised competition...was void at common law," and was in restraint of trade, and certainly within the jurisdiction of Congress.³

Another government victory during this administration against an association of coal mining companies who fixed prices and markets among themselves, was noteworthy principally because of the clarity of the logic in the Circuit Court opinion of Judge Day: "By the Constitution of the United States, Congress is given plenary powers to regulate commerce between the states and with foreign nations. In the exercise of this power, Congress may prohibit individuals by contract or otherwise, from im-

1. U. S. vs. Trans-Missouri Freight Association, 166 U. S. 290-340 (1897)

2. U. S. vs. U. S. Joint Traffic Association, 171 U. S. 93 (1898)

3. U. S. vs. Addyston Pipe Co. 175 U. S. 211 (1898); 85 Fed. Rep. 271 (1899)

peding the free and untrammelled flow of such trade. In the exercise of this right, Congress has seen fit to prohibit all contracts in restraint of trade. It has not left to the Courts the consideration of the question whether or not such restraint is reasonable or unreasonable, or whether or not the contract would have been illegal at common law. The act leaves for consideration by judicial authority no question of this character, but all combinations and contracts are declared illegal if in restraint of trade... It was believed and declared (in common law) that the public interests were best served when commerce and trade were left unfettered by combinations which had the effect to destroy competition in whole or in part. It was in this same spirit and with the same end in view, that Congress passed the act...which is aimed to maintain interstate commerce upon the basis of free competition, and contracts which have the tendency to restrain that freedom are within the condemnation of the law. The courts are not concerned with the policy of the law. It is not for them to inquire whether it be true, as is often alleged, that this is a mistaken public policy, and combinations in the reduction of the cost of production, cheapened transportation, and lowered cost to the consumer, have been productive of more good than evil to the public. The constitution had delegated to Congress the right to control and regulate commerce between the States. In the exercise of this right, it has declared for that policy which shall keep competition free, and leave interstate commerce open to all, without the right of any to fetter it by contracts or combinations which shall put in under restraint."¹

1. U.S. vs. Chesapeake & Ohio Fuel Co. et. al. 115 Fed. Rep. 616.

II THE "TRUST-BUSTING" ERA

The Northern Securities Case

In 1901, in spectacular move, a \$400,000,000 holding company, the Northern Securities Co. was formed, bringing together two hitherto competing railroads, the Northern Pacific and the Great Northern. A government decree enjoining the two companies from paying dividends to the holding company and further enjoining the holding company from exercising any control over the two railroads, was upheld March, 1903 in the Circuit Court for Minnesota. The court opinion pointed out that the combination aimed at the lessening of competition; it declared that if an individual were given the majority of stock of both companies and had been empowered to vote the stock as his own, receive all the dividends thereon and distribute them among the stockholders, the result would be "a combination in direct restraint of interstate commerce, because it would have place in the hands (of the individual)...the power to suppress competition between two interstate carriers, whose lines are practically parallel."

"It is manifest therefore, that the New Jersey charter of the Northern Security Company is about the only shield that the defendants can interpose between themselves and the law. The reasoning which led to the acquisition of the charter would seem to have been that while, as individuals, the promoters could not, by agreement among themselves, place the majority of the stock of the two parallel and competing railroads in the hands of a single person, or few persons, might create a purely fictitious person termed a corporation, which could neither think nor act except as they directed, and by placing the same stock in the name of that artificial being, could accomplish that same purpose. The manifest unreasonableness of such a proposition and the grave consequences sure to follow from its approval, must compel us to assume that it must be unsound; especially when we reflect that the law...always looks at the object accomplished, rather than the particular devices or means by which it has been accomplished.

"The trust law has been violated and the government is entitled to a decree."¹

The Supreme Court, March 14, 1904, upheld the findings of the Circuit Court in a five-four decision. The result caused a sensation throughout the entire country. "The action was sensational in all respects--as a reversal of itself by the Supreme Court of the United States (i.e. from the Knight Case), in its effects on corporate industry, in its assertion that as between government and business, government is supreme."²

President Theodore Roosevelt triumphantly remarked;

"...The Northern Securities suit is one of the great achievements of my administration. I look back upon it with pride, for through it we emphasized the fact that the most powerful men in this country were held to accountability before the law. It was necessary to reverse the Knight case in the interest of the people against monopoly and privilege, just as it had been necessary to reverse the Dred Scott case in the interests of the people against slavery and privilege. The success of the Northern Securities case definitely established the power of the government to deal with all great corporations."³

The Roosevelt Policy

During the Roosevelt administration a definite modification of policy may be noticed, distinguishing it from the more simplified philosophy of Senator Sherman's colleagues. Thus the President, in his annual message, December 1902, said:

"In curbing and regulating the combinations of capital which are or may become, injurious to the public, we must be careful not to stop the great enterprises which have legitimately reduced the cost of production, not to abandon the place which our country has won in the leadership of the international industrial world, not to strike down wealth with the result of closing factories and mines, or turning the wage earner idle in the streets and leaving the farmer without a market for what he grows..."⁴

1. U. S. vs. Northern Securities Co. et. al. 120 Fed. 721; 193 U. S. 197

2. Op.Cit. "Our Times" - page 463

3. "Our Times" - Pages 463- Ibid.

4. Messages and Papers of the Presidents 6701.

Again insisting on the distinction between "good" and "bad" combinations,¹ President Roosevelt in his annual message of 1906, said; The actual working of our laws has shown that the effort to prohibit all combinations, good or bad, is noxious where it is not ineffective. Combination of capital, like combination of labor, is a necessary element of our present industrial system. It is not possible completely to prevent it; and if it were possible, such complete prevention would do damage to the body politic. What we need is not vainly to try to prevent all combinations, but to secure such rigorous and adequate control and supervision of the combinations as to prevent their injuring the public, or existing in such form as inevitably to threaten injury--for the mere fact that a combination has secured practically complete control of a necessary of life would under any circumstances show that such combination was to be presumed to be adverse to the public interest. It is unfortunate that our present laws would forbid all combinations which do good and those combinations which do evil."

The Philosophy underlying the activities of Attorney General Knox famous as a "trust-buster" is important, since it formed the basis of later legislation. In a letter sent to Senator Hoar of the Senate Judiciary Committee, January 8, 1903, Knox said: "The end desired by an overwhelming majority of the people of all sections of the country is that combinations of capital should be regulated and not destroyed, and that measures should be taken to correct the tendency towards monopolization of the industrial business of the country...In my judgement, a monopoly in any industry would be impossible in this country, where money is abundant and cheap and in the hands or within the reach of keen and capable men, if competition were assured of a fair and open field and protected against unfair, artificial and discriminating practices...If the law will guarantee to the small producer protection against piratical methods in competition and keep the highways to the markets open and available to him for the same tolls charged to the powerful competitor he will manage to live and thrive to an astonishing degree."²

1. Messages and Papers of the Presidents 7040

2. Sen. Doc. No. 73, 57th Cong. Second Session, page 15.

The Rule of Reason

Landmarks in the history of antitrust policy were the promulgation of the "rule of reason" in the Standard Oil and American Tobacco cases.

The Standard Oil Case: The Standard Oil Company of New Jersey in 1899 had become a holding company marketing through its subsidiaries more than eighty percent of all illuminating oil sold in the country; manufactured more than seventy five percent of all petroleum refined, sold more than eighty percent of the naptha and sold more than ninety percent of all lubricating oil sold to railroads in the United States.¹

The government bill charged that the company was a combination in restraint of trade and a monopoly and pleaded that it be enjoined from exercising control in any manner over its constituent members.

The Circuit Court (of Missouri) unanimously upheld the government's plea, November 1909. The decision after listing the early history of the trust, stated that the holding company, "by means of this trust and the commanding volume of the oil business which it acquired thereby, secured and has since exercised and is using, the power to prevent competition,...between the companies which it controls, to fix for them the purchase price of the crude oil, the rates for its transportation, and the selling prices of its products. It has prevented, and is preventing, any competition in interstate and international commerce in petroleum and its products between its subsidiary companies, and between these companies and itself."²

1. John D. Clark. Appendix D-1, page 341

2. U. S. vs. Standard Oil Company of New Jersey et. al. 173 Fed. Rep. 177-221 U. S. 60-62.

The Supreme Court upheld the findings of the Circuit Court. Chief Justice White in his interpretation of Sections One-Two of the Sherman Law, after reviewing common law and United States Law in restraint of trade, said in part:

"The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or international commerce but to protect that commerce from being restrained by methods whether old or new, which would constitute an interference that is an undue restraint...Thus not specifying but indubitably contemplating and requiring a standard, it follows that it was intended that the standard of reason which had been applied at common law and in this country in dealing with subjects of the character embraced by the statute, was intended to be the measure used for the purpose of determining whether in a given case a particular act had or had not brought about the wrong against which the statute provided ---The statute by the comprehensiveness of the enumerations embodied in both the first and second sections makes it certain that its purpose was to prevent undue restraints of every kind and nature."

Justice Harlan, the only dissenter, objected to the "judicial legislation" in inserting the words "undue" and "standard of reason" into the interpretation of the act.

The American Tobacco Case: This "rule of reason" was reaffirmed in the Tobacco Case, where the Court found to be in undue restraint of interstate and foreign trade,

"The 'Tobacco Trust' so called, consists of over fifty corporations which controls a greatly preponderating proportion of the tobacco business in the United States...in each and all its branches; in some branches the volume being as high as ninety five percent. Prior to their absorption many of these corporations had been active competitors...They competed in the purchase of raw materials, in manufacturing, in jobbing and in selling to the consumer. Today those plants which have not been closed are with one or two exceptions, under the absolute domination of the supreme authority... Should a party with moderate capital desire to enter the field, it would be difficult to do so against the opposition of this combination...In many instances it is evident that if not acutally compelled to join they (the corporations)

rather than face an unequal trade war, in which the odds were all against them and in which success could only be achieved by a ruinous expenditure of time and money."¹

Exposition of Rule

The enunciating of the "rule of reason" caused numerous reverberations, and in fact was one of the leading factors motivating later anti trust legislation. However in Mr. Taft's authoritative book, it is pointed out that it was the only logical interpretation.²

Mr. Taft points out that at common law, a contract entered into with the sole object of restraining the exercise of a trade or a profession was void. However if the restraint is merely incidental to the main purpose of the agreement, which may, for example, be to secure a fair price for a business sold, then it is not void. If however, the restraint is broader than is reasonably necessary for the purpose it is void.

By the mere application of the accepted judicial technique of analogical reasoning this common law distinction could be applied to the decisions under the Sherman Law.

"Any agreement between two or more competing companies of which the sole purpose is to restrain competition, say by fixing prices, or by apportioning territory, or restricting output, is unlawful at common law and indictable under the Sherman Law. It makes no difference how laudable the purpose or motive, or how beneficial the result; if restraint alone, whether partial or general, is the sole purpose of the contract, it is void. If however, the restraint upon competition accompanies a transfer of property or other legitimate business transaction, it becomes necessary to consider the scope and purpose of the restraint. Every

1. U. S. vs. the American Tobacco Co. et al. 164 Fed. Rep. 700
2. Taft--pages 113-115. Op.Cit.

combination of competitors restrains, because it eliminates the mutual competition of the combining units, but every such combination is not illegal. If the purpose is to promote economy and efficiency, the combination is legal; but if its real purpose is to eliminate competition as a step to control the market, the transaction is illegal.

"In substance this is Justice White's rule of reason, which treated as illegal those contracts 'Which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act, where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce, and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy."

Mr. Taft further points out that here was a legal principle capable of logical application and development, which judges could employ without going into the field of economic or political expediency. "To determine whether or not a given combination or contract, though in restraint of trade, is nevertheless so beneficial in its economic effects as to be worth protecting...is to exercise a legislative power which should never be entrusted to the courts. To decide whether or not such a restraint is merely incidental to a legitimate business transaction, and not the main purpose of the contract, is not assuming legislative power at all. It is only exercising the function that courts have exercised in applying a well-measured and definite yardstick to contracts incidental and ancillary for now more than three centuries."¹

In official language, while he was President, Mr. Taft enunciated his philosophy in his annual message to Congress, January 1910.²

"...We must infer that the evil aimed at was not the mere bigness of the enterprise, but it was the aggregation of capital and plants with the express or implied intent to

1. Ibid. pages 115-116.

2. Walker - Op. Cit. Page 274.

restrain interstate or foreign commerce, or to monopolize in whole or in part. Monopoly restrains competition utterly, and restraint of the full and free operation of competition has a tendency to restrain commerce and trade. A combination of persons, formerly engaged in trade as partnerships or corporations or otherwise, of course eliminates the competition that existed between them; but the incidental ending of that competition is not to be necessarily regarded as a direct restraint of trade, unless of such an all-embracing character that the intention and effect to restrain trade are apparent from the circumstances, or are expressly declared to be the object of the combination.

"A mere incidental restraint of trade and competition is not within the inhibition of the act, but it is where the combination or conspiracy or contract is inevitably and directly a substantial restraint of competition and so a restraint of trade, that the statute is violated...But if they attempt by a use of their preponderating capital and by a sale of their goods temporarily at unduly low prices to drive out of business their competitors, or if they attempt, by exclusive contracts with their patrons and threats of non dealing except upon such contracts, or by other methods of a similar character, to use the largeness of their resources and their extent of output, compared with the total output, as a means of compelling custom and frightening off competition, then they disclose a purpose to restrain trade and to establish a monopoly and violate the act.

"The object of the antitrust law was to suppress the abuses of business of the kind described. It was not to interfere with a great volume of capital which, concentrated under one organization, reduced the cost of production and made its profits thereby, and took no advantage of its size by methods akin to duress to stifle competition with it."¹

President Taft was explicit in his opposition to any statutory distinctions between "good" and "bad" trusts, expressing the fear that it might involve our judicial systems in a catastrophe to call upon it to determine, without the aid of precedents, whether a monopoly was a public benefit or a public burden.

1. Messages and Papers of the Presidents, 7450-7454.

III LEGISLATION OF 1914

Congressional Study of the Problem

In 1911 a Senate Commission was set up to study conditions in interstate commerce, looking to advisability of revising the antitrust laws. The report said in part:

"In the present status of our public policy to the great corporated problem we have at least two leading and divergent schools of thought, two tendencies, each toward a different method of procedure. The one desires to maintain, by government action if need be, the full competitive system and to rely chiefly on competition as the regulator of corporate business. The Sherman antitrust law strongly illustrates this principle.

"The other school inclines rather--to state the extremes--toward freely allowing combination, both present and future, applying thereto governmental supervision and direction as the prime regulator."¹

Committee hearings continued from August 1911 to March 1912.² Opinion in the main favored the continuance of the Sherman Act but there was sharp division as to whether or not some federal authority should be set up which would have the power to fix prices; again another widely held opinion held that authority should be given to a federal commission to approve agreements in which competitors fixed prices, under extreme conditions of business difficulty.

Antagonism towards the "rule of reason" was expressed in the Commission's report; "The Commission has full confidence in the integrity and intelligence and patriotism of the Supreme Court of the United States, but is is unwilling to repose in that Court, or any other court, the vast and undefined power which it must exercise in the ad-

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1. Report of the Com. on Interstate . U. S. Senate 62nd Cong. third session.
 2. John D. Clark - Federal Trust Policy pages 106-142

ministration of the statute (Sherman) under the rules which it has promulgated. It substitutes the Court in the place of Congress, for whenever the rule is invoked the Court does not administer the law, but makes the law...The people of this country will not permit the courts to declare a policy for them with respect to this subject. If we do not promptly exercise our legislative power, the courts will suffer ...injury...in the loss of respect. It is inconceivable that in a country governed by a written Constitution and statute law, the courts can be permitted to test each restraint of trade by the economic standard which the individual members of the court may happen to approve.

"If we do not speedily prescribe, in so far as we can, a legislative rule by which to measure the forms of contract and combination in restraint of trade with which we are familiar, or which we can anticipate, we cease to be a government of law, and become a government of men, and moreover, of a very few men, and they appointed by the President."¹

The Wilson Policy

President Wilson's theories did not coincide with Roosevelt's or Taft's which in substance held that trusts were natural evolutions of the industrial system and as such should be regulated rather than prohibited. Wilson held that efficiency did not increase with size after a certain point had been reached. Trusts did not grow-but were created to avoid competition on an efficiency basis, and thereby to sustain an organization after it had passed the efficiency point. Being inefficient they were vulnerable to competition unless they were unable to defeat their smaller competitors by unfair practices. Hence the necessary legislation should be that which was aimed at the prevention of such unfair competition.²

1. Op. Cit. Report of Commissioner of Interstate Commerce
2. "Monopoly of Opportunity" - The New Freedom, Chap. VIII.

This Wilsonian theory--or more properly credited to Justice Brandeis--holding that large combinations of capital were inherently wasteful and uneconomic and able to retain their power only through unethical trade practices, resulted in the Clayton Act.

Background of Legislation

The idea at the basis of the Federal Trade Commission Act rested on the belief that some sort of a tribunal was necessary, with power to mold and adapt the law to each new situation, since it was realized that the forms of unfair trade practices were myriad and everchanging. Since business, legal and economic problems would be encountered the commission was conceived to include businessmen, lawyers, economists and publicist. It basically represented a revolt against the alleged usurpation of power by the Court in its rule of reason. Moreover a steady body for administration was wanted, rather than allowing the Department of Justice, with its shifting personnel to be the sole agency of enforcement.

Support for this new commission came from two differing schools of thought. The first came from business who wanted a tribunal representing the public interest which would give approval in advance to certain transactions, and thus give some assurance of legality to the particular transaction. Plans presented to the Senate Commission on Interstate Commerce had in common the theory of "advice in advance", in the nature of an administrative "declaratory judgement" to

obviate uncertainty and litigation.¹

However the motive of such sponsors as Senators Newlands and Cummins was that the commission would be more a effective agency for the enforcement of the antitrust laws. The purpose was to maintain competitive conditions--"a field free to all"--but to eliminate the delays incident to judicial enforcement.

"It is believed that through the intervention of such a body of men the legislative policy with respect to combinations and monopolies could be vastly more effective than through the courts alone, which in most cases will take no cognizance of violations of the law until months or years after the violation occurs, and when the difficulty of rewarding reparation for the violation is almost insurmountable."²

Stressing of this aspect caused considerable resentment among business circles which had been misled by President Wilson's announced intentions of setting up an "advisory" board.

President Wilson, in his message, January 1914, gave his approval to the establishment of such a commission.

"The opinion of the country would instantly approve of such a commission. It would not wish to see it empowered to make terms with monopoly, or in any sort to assume control of business, as if the Government made itself responsible. It demands such a commission only as an indispensable instrument of information and publicity, as a clearing house for the facts by which both the public mind and the managers of great business undertakings shall be guided, and as an instrumentality for doing justice to business, where the processes of the courts or the natural forces of correction outside the courts are inadequate to adjust the remedy to the wrong in a way that will meet all the equities and circumstances of the case."³

1. Senate Hearings, Report of the Sen. Com. on Interstate Com, Feb.26, 1913 page 15

2. Ibid.

3. Document 625, H. R. 63d. Cong.

This keynote was adopted by both Houses; after considerable debate the Trade Commission Bill was reintroduced into the House by Representative Covington, and reported by the Committee March 16, 1914. In addition an omnibus anti-trust bill was introduced by Representative Clayton on April 14. After numerous changes the Trade Commission Act passed the Senate, August 5, and was approved September 26. On October 15 the Clayton Act was approved.

The Federal Trade Commission Act¹

1. Created the Federal Trade Commission composed of five members, to be appointed by the President, by and with the advice and consent of the Senate.
2. Salaries of the commissioners were set at \$10,000 a year.
3. Disbanded the Bureau of Corporations, whose activities were incorporated under the new commission.
4. Defined "commerce", "corporation", "documentary evidence", "acts to regulate commerce", and "Antitrust acts".
5. Declared unlawful "unfair methods of competition in interstate commerce". "Whenever the commission shall have reason to believe that any...corporation has been or is using any unfair methods of competition in commerce, and if it appear...that a proceeding...would be to the interest of the public it shall issue and serve...a complaint,...and a notice of hearing... The person, partnership or corporation complained of shall have the right to appear...and show cause why an order should not be entered by the commission...to cease and desist...The findings of the commission as to facts, if supported by testimony, shall be conclusive...The commission may modify its findings...by reason of additional evidence. The commission may apply to the circuit court of appeals of the United States...for the enforcement of its order ...subject to review by the Supreme Court upon certiorari.."
6. The Commission was empowered to gather and compile information, and to investigate business.

1. Pub. Law - No. 203 - 63d Cong. - HR15613

7. Provided that the Commission cooperate with the Attorney General in prosecution of cases.
8. Provided for cooperation from the other government departments.
9. Concerned evidence, witnesses and testimony, and a mandamus to enforce obedience to the Act.
10. Failure to attend and testify, willful false statements, removal or mutilation of file information were subjected to fines.
11. Nothing in this Act was to be construed as a modification of the Sherman Law.

The Clayton Act¹

1. Defined the Act, "commerce" and the word "person" to include corporations.
2. Prohibited discrimination in price between different purchasers of commodities of like grade and quality... where the effect of such discrimination may be substantially to lessen competition to tend to create a monopoly. Differential were allowed which made only due allowance for differences in the cost of manufacture, sale or delivery resulting from differing methods or quantities sold. Nothing in the act prevented persons from selecting their own customers, or from changing prices in sales of good faith to meet competition.
3. Prohibited exclusive dealing or tying contracts.
4. Triple damages were permitted for private litigants.
5. A final decree rendered in a suit brought by the Government was held to be prima facie evidence against the same defendant in private litigation.
6. Labor of human beings was held not to be an article of commerce.
7. Corporations were prohibited from acquiring stock of other corporations where the effect would be the substantial lessening of competition. Banks and common carriers were exempted.
8. Prohibited interlocking directorates, with especial reference to banks

1. Pub. Law - No. 212-63d Cong. H. R. 15657

9. Declared willful misapplication of moneys of a common carrier to be a felony.
10. Limited the dealings which a common carrier might have with another where there existed the case of interlocking directorates.
11. Set jurisdiction to enforce complaints with the Federal Trade Commission in general business; The Interstate Commerce Commission with reference to common carriers; and the Federal Reserve Board where applicable to banks.
12. Set place of proceedings under the antitrust laws.
13. Provided for the subpoena of witnesses for the Government.
14. Violations made corporation officers liable to fines not exceeding \$5,000 or by imprisonment not exceeding one year.
15. Gave the several district courts jurisdiction over the act.
16. Provided injunctive relief for those threatened with loss by violation of the antitrust laws.
17. Preliminary injunctions and temporary restraining orders were limited by necessity of ability to show immediate or irreparable injury or loss.
18. No restraining order or interlocutory order of injunction was allowed without giving security by the applicant.
19. Provided that injunction orders must be specific and detailed.
20. Restricted issuance of injunction with regard to labor disputes to cases where irreparable damage could be shown.
21. Disobedience of writs or process' was termed to be in contempt of court.
22. Fixed rules to show cause or arrest.
23. Provided for evidence and appeals.
24. Provided for cases of contempt which were exempted.
25. Fixed the proceedings for contempt.
26. Provided for separation of clauses in the event of invalidation of any of the clauses of the act.

Legal Innovations

These new laws embodied five new principles of substantive law, four of which were in the Clayton Act, the other in the Federal Trade Commission Act.

The first of these was Section Two of the Clayton Act, relating to price discriminations. This section was designed to meet a dual form of discrimination. The first was exemplified by the case of a national firm carrying on a temporary and local practice of price cutting; the second was the case of discriminations designed to place purchasers or groups of purchasers at an unfair advantage as compared to competitors who purchased at a more favorable price. The final wording stated that these discriminations were illegal where their effect would be the substantial lessening of competition, or tending towards a monopoly.

The second was Section Three of the Clayton Act, relating to exclusive or tying contracts. This also related to a dual problem. First it was to meet the case of a manufacturer of an article, generally a patented machine, who sold or leased it with the stipulation that it could be used only in connection with other machinery or supplies or accessories also made by the seller or lessor, but not covered by patents. (The validity of such tieing contracts had been sustained by the Supreme Court.¹ It was also to cover the case of a manufacturer who required of his wholesale or retail distributors an agreement not to handle the products of the man-

1. Henry vs. A. B. Dick Co. 224 U. S. 1 (1912)

ufacturers competitors. Here again these practices were declared to be unlawful only where their effect were the substantial lessening of competition or the tendency to create a monopoly.

The third of these new principles was in Section Seven of the Clayton Act, where it was made an offense for a corporation to acquire the whole or any part of the stock of another corporation similarly engaged. Stock purchased solely for investment, and acquisitions growing out of the formation of subsidiary organizations in order to carry on their "immediate lawful business" were safeguarded.

The fourth principle was embodied in Section Eight of the Clayton Act, which made it illegal for competitors to have interlocking directorates. As in the prior sections the criterion was made the substantial lessening of competition and the tendency towards monopoly.

All of these principles as introduced in the original Clayton Bill carried criminal penalties; all criminal penalties for specific modes of action were removed and their practice were made merely unlawful where their effects were the substantial lessening of competition or tending towards the creation of monopoly.

The fifth principle was Section Five of the Federal Trade Commission Act, where the commission was given the authority to issue restraining orders against "unfair competition"; (meaning thereby the specific practice enumerated in the Clayton Act). The committee report said " it is believed

that the term ' unfair competition' has a legal significance which can be enforced by the Commission and the courts, and that it is no more difficult to determine what is unfair competition than it is to determine what is a reasonable rate or what is unjust discrimination. The committee was of the opinion that it would be better to put in a general provision condemning unfair competition than to attempt to define the numerous unfair practices..."¹

Thus in Section Five of the Trade Commission Act no specific rules of conduct were prescribed. The section merely stated a general ethical and economic principle, and relied upon the course of administration and judicial decision to give it content. In some ways it was broader in scope than the Sherman Law, while narrower in other ways. Thus on the one hand it covered a multitude of deceptive practices which might bear no relation with the problems of monopoly or restraint of trade. On the other hand it covered only a part of the field to which the law of restraints and monopolies is applicable. It covered only acts of competition between parties.

The inability or at least unwillingness of Congress to define "unfair methods of competition" has been held by some to be a failure, and hence to have been the cause of "failure" of the Federal Trade Commission to preserve competition in American business.

At any rate it is obvious that no objective standard of judgement had been created by Congress. In the Standard Oil case the approach to the problem has been put on a strictly empirical basis, namely that the Sherman Act forbids, such combinations, regardless of their form, which the Court, after

1. Senate Report 597, page 13.

the event regards as unreasonable, i.e. improper. No objective criterion was adopted; legality was dependent upon varying factors in each case and upon the intuitive reactions of a majority of the judges.

This standard of "unfair methods of competition" might include either a wholly new discretionary control, a new public economic policy, or simply a re-enactment of the prior law with a new enforcement agency and procedure. The courts were forced to choose between these alternatives. If the former alternative had been accepted it would have undoubtedly led to an unconstitutional delegation of legislative power (as later was the National Industrial Relations Act invalidated)¹.

Actually, however, in accepting the second alternative, the Supreme Court confined the powers of the Commission to the definitions of unfair competition as had been set up by common law precedents and its consideration of the reasonableness of competitive conduct under the Sherman law jurisdiction.

1. Schechter Poultry Corporation vs. U. S. - 295 U. S. 495
55 Sup. Court 837 (1935)

The court regards as unconstitutional, i.e. improper, the
active collection and adoption; regarding the national union
varying factors in each case and against the national resistance
of a majority of the nation.

This movement of "national rights" or "nationalism"
might include either a single or a group of countries,
new political economic policy, or finally a re-organization of the
prior law with a new administrative agency and structure. The
courts were forced to render decisions between these alternatives.
If the former alternative had been adopted it would have
undoubtedly led to an administrative system of national
active power (in later western national territories) which was
not investigated.

Actually, however, in western and eastern states
native, the European court claimed the power of the con-
stitution to the definition of which responsibility was placed
set up by common law precedents and the responsibility of the
responsibilities of common law courts under the European
jurisdiction.

IV. MODIFICATIONS OF THE STATUS OF THE FEDERAL TRADE COMMISSION

Procedure.

All formal proceedings before the Federal Trade Commission must be set in motion by a complaint issued by the Commission, and served on the person complained of, embodying the charges and setting a day for hearing. No one else can issue a complaint; individuals may bring matters to the attention of the Commission but they never become parties to the proceedings.

When an application for complaint is received, the essential jurisdictional elements are first considered. An investigator--generally an attorney--is assigned to the application and he directs his attention to the elements of fact necessary to sustain a complaint, as well as to practical questions of testimony and proof which will be encountered if a complaint is issued. A report is drawn with specific recommendations either for issuance or dismissal of the complaint. This is reviewed by an assistant chief examiner, and then transmitted to the board of review. This is an advisory board which analyses the evidence and prepares an opinion applying the law to the facts, and submits its report to the Commission, with its recommendation of the course of action to be taken. The course of action has three alternatives, to close the action, to seek to have a stipulation signed by the party complained of agreeing to the facts

and agreeing to cease and desist from pursuing this course of action, or thirdly issuance of a formal complaint.

The clerk of the Commission assigns the application, by rotation to one of the Commissioners, who in turn files a memorandum with a written recommendation. Upon this the whole Commission makes a decision whether it "has reason to believe" that there has been a violation of the law. These are all preliminaries, and as yet the party complained of may not even know that he is being investigated. All the proceedings prior to the issuance of formal complaint or publication of a stipulation are confidential.

The issuance of the complaint and all subsequent proceedings are public records. Under the Clayton Act the issuance of the complaint follows as a matter of course where the Commission "has reason to believe" that there has been a violation of the law. Under the Federal Trade Commission Act there is the further requirement that "it shall appear to the Commission that a proceeding by it in respect thereof would be in the interest of the public."

"It is the policy of the Commission not to institute proceedings ... where the alleged violation of the law is a private controversy redressable in the courts, except where said practices tend to affect the public. In cases where the alleged injury is one to a competitor only and is redressable in the courts by an action by the aggrieved competitor and the interest of the public is not involved, the proceeding will not be entertained."¹

1. Fed. Trade Com. Rules, Policy, and Acts, May 21, 1938.

and expressed to some extent the purpose of the course

of action, or simply in order to be formal and official.

The chair of the Commission on the subject of the application.

by reference to the of the Commission, which was then a

monument with a written memorandum. Upon this the Commission

Commission called a meeting on the subject of the Commission to believe

that there was here a violation of the law. There are all

qualifications, and as yet the law is not explained in any way

even now that he is being investigated. All the precedents

lead to the knowledge of the Commission of the Commission

of a violation of the law.

The Commission of the Commission and all subsequent

proceedings are public records. Under the High Court Act the

Commission of the Commission is a matter of course and

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violation of the law. Under the Federal Trade Commission Act

there is the further requirement that a report appear to the

Commission that a proceeding is in respect thereof would

be in the interest of the public.

It is the policy of the Commission not to

attain proceedings... while the Commission is in

law is a private matter and is not to be made public.

and its responsibility in the matter of the Commission is not

involved, the Commission will not be satisfied.

The complaint is drafted by the office of the Chief Counsel, and approved by the Commission, thus giving the body two separate opportunities to acquaint itself with the subject matter of the controversy; first where it considers whether or not it "has reason to believe" there has been a violation, and secondly when it approves the form of the charges. The complaint is the foundation of the whole proceeding and the Supreme Court has held that unless the complaint sets forth sufficient facts to show on its face a violation of the law, an order based upon it will be set aside, even where apparently the order was fully warranted by the evidence.

Service of the complaint is made by the Docket Section in the name of the Secretary of the Commission. Within thirty days of the service of the complaint the defendant is supposed to file an answer containing "a short and simple statement of the facts which constitute the grounds of defense." This answer is the only defensive pleading or motion permitted by the rules of the Commission. No demurrer, or motion to dismiss, will be entertained by the Commission, either on jurisdictional grounds or on the grounds that the facts alleged do not constitute a violation of the law.

There is a provision that "the jurisdiction of the Circuit Court of Appeals of the United States to enforce, set aside or modify orders of the Commission shall be ex-

The complaint is filed in the name of the
Chief Constable, and approved by the Committee, and given
the body the appropriate signature and seal. It is not
the subject matter of the complaint, but it is not
altered whether or not it is "as shown to be false" there has
been a violation, and accordingly it is approved by the
the complaint. The complaint is the foundation of the
proceedings and the House of Lords has held that where the
complaint sets forth the alleged facts as shown in the
violation of the law, and where found again to be the
truth, even where apparently the other was different
by the evidence.

Service of the complaint is made by the District
Sergeant in the name of the Constable of the Division.
This duty may be performed by any person who is
found to be qualified to do so. It is suggested that the
and single statement of the facts which constitute the
grounds of complaint. This subject is the only one
planning or action permitted by the rules of the Division.
No document, or other material, will be admitted by
the Division, except on the basis of the facts as shown
by the facts which constitute a violation
of the law.

There is a provision in the "The Jurisdiction of
the Circuit Court of Appeals of the United States to enforce
and settle or settle orders of the Division shall be ex-

clusive." Thus appeal can be made only to the Circuit Courts in order to set aside or modify a proceeding; attempts to enjoin proceedings have, to date, been failures, since the courts seem to feel that such a jurisdiction would be inconsistent with the purposes of the act.¹

One decision clearly enunciates court opinion on this matter. "...What is really sought by petitioners (seeking a dismissal of the Commission's complaint) is that this court should halt inquiry at the threshold, exercising in effect, the powers of a court of original jurisdiction, in which a cause is pending...The procedure invoked is similar, in effect, to that prevailing in a court of original jurisdiction which has control of the successive steps of pleading, practice, trial and final judgement of decree. But it must be remembered that the court has no original jurisdiction of this nature. Its functions are confined to a review of certain acts of the Federal Trade Commission which are specifically defined by Congress...It was not intended that the Circuit Court of Appeals should be drawn into original conduct of these investigations. If this court is to exercise plenary power and control in determining at the outset what party shall be dealt with, what investigations shall be made, and what recommendations submitted, then it has, in effect, been constituted an original trial tribunal...

"...The power of the Court is limited to the enforcement of the final orders of the Commission to cease and desist, upon the application of the Commission, and to review of such orders at the request of the party against whom such orders are made, and in such cases it has the power to enforce, affirm, modify or set aside, as it may deem proper."²

The next step is the trial of the facts. A Commissioner or an examiner is appointed by formal resolution to hold hearings at a convenient time and place. The

1. T.C.Hurst & Son vs. F.T.C. et.al., 268 Fed. 874 (1920).
2. Chamber of Commerce of Minneapolis et.al. vs. F.T.C. et.al., 280 Fed. 45.

examiner is a member of the examining division of the Legal Department, appointed on the recommendation of the Chief Examiner; The Commission is also represented in its prosecuting capacity--it must be realized that the Commission has the dual position of judicial and prosecuting categories.

The person complained of is given the authority to appear and show cause why an order should not be issued; the only factor actually necessitating presentation of testimony by the Commission, in support of its complaint is the item which says that the findings of the Commission as to facts, "if supported by testimony" shall be conclusive.

Provisions are made for the compelling the attendance of witnesses and the production of documentary testimony, since neglect or refusal to answer in reply to a subpoena is "punishable by imprisonment of not more than a year, or by fine of not less than \$1,000 nor more than \$5,000, or both.¹ Also district courts may by contempt proceedings compel the attendance of contumacious witnesses.

After the submission of evidence in support of the complaint, and then on behalf of the respondent, the trial examiner prepares a report of the evidence for the information of the Commission, counsel of the Commission, and counsel for the respondent. Exceptions to the trial examiner's report may be taken by counsel for either side.

1. F.T.C. Act, Section 10.

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Examiner; the Commission is also represented in the pro-
secuting department. It was he testified that the Commission
has the dual position of judicial and prosecuting authority.
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to appear and make cases with other things not be known;
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to facts, "is supported by testimony" and the evidence.
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ness of witnesses and the production of documentary evidence;
which witness or refusal to answer in reply to a subpoena is
punishable by imprisonment or fine not more than \$5,000, or both.
Also district courts may by contract proceedings punish the
attendance of witnesses or obstructive witnesses.
After the admission of evidence in regard to
the complaint, and then on behalf of the respondent, the
trial examiner prepared a report of the evidence for the
information of the Commission, counsel of the Commission,
and counsel for the respondent. Testimony in the trial
examiner's report may be taken by counsel for either side.

Within a stated time after the trial examiner's report is made, briefs are filed, and the case is set for final (oral) argument before the Commission. Thereafter the Commission reaches a decision either sustaining the charges made in the complaint, or dismissing the complaint, or closing the case.

If the complaint is sustained, the Commission makes its findings as to the facts and states its conclusion that the law has been violated, and thereupon an order is issued requiring the respondent to cease and desist from such violation.

If the complaint is dismissed or closed, an appropriate order is issued; sometimes such orders are accompanied by written opinions, although more often reasons for the action appear only in the order.

The drafting of the order is a complex problem. The complaint may involve one or several violations of the law. If the order of cease and desist is too general it goes beyond the practice which the respondent is found to have used. If it is too narrow, it can be evaded by a slight modification of the practice.

Up to and including the cease and desist order there is no difference in procedure whether the case is under the Federal Trade Commission Act or under the Clayton Act. Both acts embody procedure for their enforcement by the Commission, and their provisions in this regard were sub-

within a stated time after the initial examination
report is made, which is filed. But the case is not
final (or) argued before the Commission. The
Commissioner makes a decision which is subject to
appeal. He may refer the matter to the Commission
or finally decide it.
If the complaint is maintained, the Commission
may direct the respondent to do the things which
have been violated, and to pay compensation or
damages. The respondent is responsible to make and
execute the order.
If the complaint is dismissed or closed, an
order is made in favour of the respondent. The
complaint is dismissed, subject to the order
for the respondent to pay in the order.
The duration of the order is a matter of
fact. The complaint may involve one or several violations of the
law. If the order of cease and desist is not issued, it
may be beyond the power of the respondent to comply with
the order. If it is not complied with, it may be treated as a
violation of the law.
Up to and including the date of the order, the
respondent is responsible in procedure. After the order is
made, the Federal Trade Commission has no power to
act. Both acts embody provisions for their enforcement by
the Commission, and their provisions for their enforcement by the

stantial until the former act was amended, March 21, 1938 -- the Wheeler-Lea Act.

Under the Federal Trade Commission Act, as amended, an order to cease and desist becomes final sixty days after its issuance, unless within that period the respondent petitions the United States Circuit Court of Appeals to review the order. In case of such a review, the Commission's order becomes final after affirmance by the Circuit Court.¹ Violation of an order to cease and desist after it has become final and while it is in effect subjects the offender to a civil penalty of not more than \$5,000 for each violation, recoverable by the Government.

Under the Clayton Act an order to cease and desist does not become final, in the sense that its violation subjects and violator to a penalty, until the Circuit Court of Appeals shall have issued its order commanding obedience, on the application of the Commission for enforcement.

Under both acts the respondent may apply to the Circuit Court of Appeals for a review of an order, and either upon the application of the Commission for enforcement or of the respondent for review, the court has power to affirm, or affirm as modified, and to enforce to the extent affirmed, or to set aside the order. Also under both acts, either party may apply to the Supreme Court for review, under certiorari, of the action of the Circuit Court of Appeals.

1. Pub. No. 447, 75th Congress 3d, Session

essential until the hearing has been completed, which is, 1953 -
the President's act.

Under the Federal Trade Commission Act, as

amended, in order to be able to conduct business during

days after the hearing, which would be held within 30

days after the hearing, the Federal Trade Commission is authorized

to review the order. In case of some orders, the Commission

order review is not required until the 30th day of the 30th day.

Violation of an order to cease and desist after 30 days means

that the order is in effect, subject to the right to a

final review of not more than 30 days for each violation.

Respectfully, the Government.

Under the Federal Trade Commission Act, as amended, the

order may become final, in the event that the violation appears to

the violator to be a penalty, until the Federal Trade Commission

may have issued the order, subject to the right to a

petition of the Commission for review.

Under the Act, the Commission may apply to the

Federal Trade Commission for a review of an order, and the

order may be suspended if the Commission for review is not

the respondent for review, the order may be suspended, and

shall be modified, and to enforce the order, subject to

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order, the order, the order, the order, the order, the order,

1. Pub. No. 857, 75th Congress, 2d Session

Stipulations

Under certain circumstances the Commission, instead of disposing of cases by formal complaint and trial, affords the respondent the privilege of disposing of a case by signing a statement of fact and agreement to discontinue the alleged unfair method of competition.

This procedure is used where it seems to the Commission that the violation occurs through ignorance or misunderstanding and that the attention of the violator has only to be called to the violation to induce discontinuance of the practice, thus saving the expenses of litigation. In such an instance the Commission, instead of issuing a formal complaint grants the respondent the opportunity to sign a statement of facts disclosed by the investigation and agreement to cease and desist from the practices charged. If such a stipulation is signed, further action is suspended; if it is not signed, the case goes to trial.

"It is the policy of the Commission not to accept stipulations in cases where it has reason to believe that the respondents have been guilty of intentional fraud or wrongdoing, or violation of Section 14 of the Federal Trade Commission Act (concerning advertisement of commodities injurious to public health), or of violation of certain sections of the Clayton Act or of violations of the criminal sections of the Sherman Act or any other statute, or where, in the opinion of the Commissioners, the respondents will not keep the agreement. The Commission reserves the right in all cases, for any reasons which it regards as sufficient, to refuse to extend this privilege."¹

The importance of this method of stipulation may be gathered from figures accumulated from 1915 to June 30, 1938, which show that of a total of 11,753 cases disposed of,

1. Rules, F. T. C., May 21, 1938, page 95.

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The importance of this method of stipulation may be gathered from figures accumulated from 1913 to June 30, 1938, which show that of a total of 11,753 cases disposed of,

5,186 were settled by stipulation.¹

Legal Powers of the Commission

The Federal Trade Commission is a specialized prosecuting agency authorized to initiate and conduct proceedings in the public interest in a specialized and limited field. However the Commission is also endowed with the faculty of making, under certain conditions, findings which the courts must respect if they are supported by testimony. This faculty alone gives it a judicial character, although in a limited way. The probable reason why Congress gave the Commission these judicial powers was undoubtedly the belief that they felt that the problems encountered would be of a technical and specialized character calling for special training and knowledge which a general court might not possess.

It is only the "findings of fact", supported by testimony which are binding upon the courts. (Obviously questions of law will be disposed of by the courts without regard to the Commission's conclusions.) There is a considerable ambiguity concerning these words, and this is heightened by the context in which they appear. Thus physical facts are subject to individual observation and measurement and objective conditions may be regarded in entirely differing lights by several witnesses. Moreover many decisions depend not only upon the finding of the existence or non existence of certain facts, but also upon the judgement of an individual, thus as

1. Annual Report of the Federal Trade Commission, for fiscal year ending June 30, 1938. page 95

regards a professional viewpoint concerning probable consequences to a certain line of conduct. Thus when a technical body such as the Interstate Commerce Commission decides on a certain level of rates as one which they believe will give a fair return, it obviously is not a question of fact, since the question lies in the future. The Commission in this case, is merely exercising its judgement in the light of existing facts and past experience, in determining what is likely in the future, and what is likely to be the practical consequence of one course or another.

Legal Limitations of the Commission

In administrative law the principle of judicial review must be retained in order to safeguard individual rights. The Supreme Court has refused to permit the findings of fact, by an administrative agency, to be made conclusive, where constitutional rights of liberty and property are involved, and has repeatedly asserted its authority to review in detail, the evidence before an administrative tribunal, to determine whether its ultimate findings were justified by the nature and weight of the evidence.¹ This has been especially true where the field regulated involved disputed questions of social and economic policy, in which decisions on questions of fact were not susceptible to precise determination. However it is established that court review should be

1. Regulation of Competition - N. B. Gaskill, Pages 146-172

regards a hypothetical situation concerning property and
 responses to a certain line of conduct. That when a person
 about body and the individual's personal conduct is
 on a certain level of conduct and which they will not
 give a full answer, it obviously is not a question of fact,
 since the question lies in the future. The conclusion is
 that, in such a case, the judgment is the result
 of existing facts and past experience, an understanding of what is
 likely to be the future, and what is likely to be the practical
 consequences of the course of action.

Local limitation of the conclusion

In such a case the principle of local
 review must be retained in order to preserve individual
 rights. The review must be limited to review the facts
 and of fact, by an administrative agency, so as to
 review, where constitutional rights of liberty and property
 are involved, and not necessarily involving the authority to
 review in detail, the various factors in administrative
 action, to determine whether the administrative action is
 lawful and whether the action is not excessive. This can be
 especially true where the facts reviewed involve physical
 questions of legal and economic rights, as well as
 on questions of fact and not necessarily to review
 action. However, it is understood that such review should be
 limited to the question of whether the action is

restricted to certain questions in administrative law, and should not be extended to any issue of fact or conduct which was entrusted to an official because of his supposed technical experience and capacity for practical judgement. (Thus courts should not have to consider engineering questions involving construction of bridges by Army Engineers, etc.) Whether they were questions of law or of fact, the undoubted purpose of the legislation was to create a competent expert tribunal to decide upon them, and this purpose is defeated if a court proceeds to substitute its lawyers judgement for the judgement of such tribunal.

States with Courts: In most statutes creating administrative agencies there is express or implied recognition of the proper scope of judicial review. Thus in the case of the Interstate Commerce Commission, the Supreme Court has created, in a series of cases, a category of "administrative questions" upon which it will refuse to substitute its judgement for that of the Commissions, and upon which courts may not inquire until the Commission has made its ruling. These rulings are not based on distinctions between questions of law and questions of fact, or on any statutory limitations on the right of review; rather they rest on the courts realization of the importance of expert decision upon questions of great economic importance.

As a matter of practical importance, the status of the administrative agency, in the opinion of the courts

in such respects as confidence in the efficiency and fairness of the agency, is important, since the courts impose constitutional restrictions on those agencies who fail to attain a measure of understandable reasonableness. In the past, at least, the Federal Trade Commission has fallen far short of the status which other agencies (such as the Interstate Commerce Commission) have attained. Hence the courts consider the entire record as a basis for the orders of the Federal Trade Commission, whereas the orders of the Interstate Commerce Commission are viewed only from the angle of jurisdiction and patently defective action.

However the Federal Trade Commission was created as a body especially qualified to pass judgements on questions of competition and monopoly, and experts were provided for in the fields of law, accounting and economics.

Both the Federal Trade Commission Act and the Clayton Act provide that the findings of fact "if supported by testimony" shall be conclusive. This phrase leaves it in doubt whether or not mere physical facts are referred to, or if it refers to a broader range of questions involving judgement in the formulation and application of standards. Provisions of the two acts throw little light on whether there existed the intention of conferring on the Commission the power of administrative judgement or to confine its power to a strict application of legal reasoning to physical facts.

One criterion established is that of "unfair methods

of competition this of course involves questions of ethics as well as those of economic and business judgement.

Another criterion set up in the Clayton Act is "where the effect may be...to substantially lessen competition, or tend to create a monopoly in any line of commerce." It would seem from these that Congress, which had seen the futility of attempting a strictly legal solution of monopoly problem in the enforcement history of the Sherman Act, had expected that the Commission would exercise a wide latitude of administrative judgement.

Whatever the intentions of Congress, judicial opinion (as we shall see) has established the Commission as a fact-finding body in a very restricted sense, with authority to make conclusive findings only as to the existence or non existence of physical facts.

The Warren Case: The first of these was the Warren case,¹ this concerned a firm selling jute bagging and steel ties, with a selling policy of "tieing" these two products together, and to refuse to sell one without the other. The Commission charged that this was an "unfair method of competition", under Section Five of the Federal Trade Commission Act, although they might have also charged an unlawful restraint of trade and a tendency to monopoly. It has been pointed out that the Commission deliberately avoided this tieing up with the provisions of the Sherman Law, in order to attempt to build up its own new jurisdiction²

1. F. T. C. vs. Warren, Jones & Gratz 253 U. S. 421 (1919)

2. Nelson B. Gaskill - Op. Cit.

The Circuit and Supreme Courts' opinions showed that the Federal Trade Commission Act and the Sherman Act are derivations from the same common law background, and have the same intent and meaning. The opinion stated that "all questions of monopoly or combination being out of the way, a private merchant acting with entire good faith may properly refuse to sell except in conjunction, such closely associated articles as ties and bagging."

"The words 'unfair methods of competition' are not defined by the statute, and their exact meaning is in dispute. It is for the courts, not the Commission, ultimately to determine as a matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals...or because of...tendency to...create monopoly."

In this manner the Commission's powers were cut not only by the blunt statement that "it is for the courts... to determine" but also by the use of the phrase "never heretofore" the Commission was strictly limited to powers of pre-existing law.

The Curtis Publishing Case: The second case in the series was that of the Curtis Publishing Company,¹ and concerned the problem of exclusive agencies. The Court opinion said in part; "...Manifestly the Court must inquire whether the Commission's findings of fact are supported by evidence. If so supported, they are conclusive. But as the statute grants jurisdiction to make and enter, upon the pleadings, testimony, and proceedings, a decree affirming, modifying, or setting aside an order, the Court must also have the power to examine the whole record and ascertain for itself the issues presented and whether there are material facts not reported by the Commission. If there be substantial evidence relating to such facts, from which different conclusions reasonably may be drawn, the matter may be...remanded

1. Curtis Publishing Company vs. Federal Trade Commission
270 Fed. Rep. 881 260 U. S. 568.

2. Gaskill page 73, Op. Cit.

The following is a summary of the evidence presented

that the accused is a person of good character and that the evidence is not sufficient to establish the charge.

The evidence is not sufficient to establish the charge.

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to the Commission--the primary fact-finding body--with the direction to make additional findings, but if from all the circumstances it clearly appears that in the interest of justice the controversy should be decided without further delay, the Court has full power under the statute so to do."

The Court could thus review testimony, make its own findings of fact, and issue its own order. "This reduced the Federal Trade Commission to the dimensions of a messenger boy plying between a private complainant and the courts, carrying up a question, and carrying back an answer" is the rather bitter comment of a former Commissioner.¹

The Klesner Case: The third case in the series was the Klesner Case.² This was where a Washington D. C. partnership, makers of window shades, split and one of the partners set up a shop nearby with the same name, "The Shade Shop". The Commission found that customers were being deceived and that the original shop's trade and goodwill were seriously affected.

The Court of Appeals reversed the order and was upheld by the Supreme Court, who said; "...Section Five of the Federal Trade Commission Act does not provide persons with an administrative remedy for private wrongs. The formal complaint is brought in the Court's name; the prosecution is wholly that of the Government; and it bears the entire expense of prosecution.

"While the Federal Trade Commission exercises under Paragraph Five, the functions of both prosecutor and judge, the scope of its authority is strictly limited. A complaint may be filed only 'if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public.'"

1. Gaskill - page 73 op. cit

2. Federal Trade Commission vs. Klesner - 280 U. S. 19

After a lengthy discussion on the enforcement of private right where the protection of the public interest is only incidental, the Court said; "...to justify the Commission in filing a complaint under Paragraph Five the purpose must be protection of the public. The protection thereby afforded to private persons is the incident...

"In determining whether a proposed proceeding will be in the public interest, the Commission exercises a broad discretionary power. But the mere fact that it is to the interest of the community that private rights shall be respected is not enough to support a finding a public interest. To justify filing a complaint the public interest must be specific and substantial... Sometimes, because, although the aggregate of the loss entailed may be so serious and widespread as to make the matter of public consequence, no private suit would be brought to stop the unfair conduct since the loss to each of the individuals affected is too small to warrant it. "

This definitely closed the Federal Trade Commission's possibilities as a public prosecutor of private actions. Those injured at common law through fraud, deception, and misrepresentation could bring suit for damages. This modification of the Commission's powers has been seen by some as the reaffirmation of the "Rule of Reason". The Court could be seen as measuring the quantitative volume of the method projected as indicative of the presence or absence of the public interest. The conclusion was then, that when the method injures a single competitor he must seek redress by private action for his own protection. But when a number of competitors are injured, the public interest appears.

The Raladam Case: The fourth of these limiting cases was that of the Raladam Company.¹ This Raladam Company

1. Raladam Company vs. F. T. C. - 42 Fed. (2d) 430, 283 U. S. 643
2.

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I. Public interest in the protection of the public interest in the protection of the public interest

sold an obesity remedy and solicited sales by a series of what the Commission alleged to be misrepresentations to the prejudice of the public and competitors. The Commission's case was based primarily, however, on protection of the buying public. The Circuit Court for the Sixth District reversed the Commission's orders on the grounds that the questioned representations (of the respondent) were not capable of demonstrable proof, pro or con, and held that the subject transcended the Commission's fact-findings powers, and in its opinion, stressed the fact that the Commission's lawful jurisdiction was set up simply as an "aid to the enforcement of the general governmental anti-trust and anti-monopoly policy" and that its jurisdiction did not go "beyond the limits of fair relationship to that policy."

The Supreme Court upheld this and also mentioned the lack of public interest in the complaint, pointing out that "the power of the Commission to take steps looking to the issue of an order to desist, depends upon the existence of three distinct prerequisites; first, that the methods of complained of are unfair; second, that they are methods of competition in commerce (interstate); and thirdly, that a proceeding by the Commission to prevent the use of the methods, appears to be in the interest of the public."

the competitor, rather than the complainant is the manufacturer of the goods under question.

Cases of violation of trade mark differ where the marks are registered. Where a mark is eligible for registration and has been registered under the Trade Mark Act,¹ it is protected by a special procedure set forth in that Act.

1. U.S. Rev. Stat., Sec. 5625.

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methods, appears to be in the interest of the public."

V. THE FEDERAL TRADE COMMISSION AND

UNFAIR TRADE PRACTICES

Judicial limitations then, have conditioned the scope of the activities of the Trade Commission. While it has addressed itself to certain practices and arrangements of an essentially monopolistic nature, the general drift of its decisions has been towards emphasis upon standards of commercial conduct without immediate reference to monopoly and restraint of trade.

In analyzing activities of the Federal Trade Commission there is a natural demarcation between its activities in, first, deceptive and dishonest practices; and secondly those practices which restrain trade.

Misrepresentation.

Deceptive practices in Trade Names and Trade Marks are those, in which misrepresentation generally takes one of two forms. It may lead the customer to think that the goods that he is buying from the competitor were in fact made by the complainant; or it may lead the customer to think that the competitor, rather than the complainant is the manufacturer of the goods under question.

Cases of simulation of trade mark differ where the marks are registered. Where a mark is eligible for registration and has been registered under the Trade Mark Act,¹ it is protected by a special procedure set forth in that Act.

1. U.S. Rev. Stat., Sec. 4695.

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Cases of simulation of trade mark differ where the marks are registered. Where a mark is eligible for registration and has been registered under the Trade Mark Act, it is protected by a special procedure set forth in that Act.

Where a dispute occurs the question may be adjudicated by an examiner in the Patent Office, with a right to appeal to the Commissioner of Patents, and to the Court of Appeals of the District of Columbia. Where an infringement is found to exist, the infringing mark may be denied registration, or its registration cancelled, whatever the case may be.

Where the mark is such that it cannot be registered, or where the simulation is of the form, size, color or other distinctive attribute of the complainants goods, statutory procedure is not available. A court of law, state or federal, will give damages in a proper case for injury sustained. A court of equity will enjoin such conduct and will generally grant incidental damages.

In a series of "conference rulings" the Federal Trade Commission has held that where nothing further is involved than a claim of infringement on a patent, copyright or registered trade mark, the public interest does not warrant the issuance of a complaint--in the absence of important countervailing considerations, such as when a small producer lacks resources for legislation--based upon the belief in the adequacy of other available remedies.¹

A much larger number of cases involve simulation of names not registered as trade marks. The mere fact that there are remedies in the courts is not considered sufficient reason to refuse to act in such a case.

1. Henderson, Op. Cit., pg. 168.

1. *Amst. Jordan Mills Co. vs. Higney & Co.*, 247 Fed. 407 (C.A. 1, 2d. 1919).

2. *Willie-Overland Co. vs. Alton-Overland Tire Co.* (D.C. Del.) 268 Fed. 131, 1900.

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However the Federal Trade Commission is not well equipped to handle cases of "passing off" either in the matter of rendering a binding decision on the question of priority of rights or in the enforcement of orders. The time involved is too great for real remedy or protection against piratical businessmen, as compared with the remedies which the ordinary court of equity can administer in such a case; where a producer can file a bill, and under certain circumstances can get a restraining order within a few days, which can be violated only under the risk of jail sentence or fine.

The weight of authority is now clearly that a vendor of an allied though non-competitive article may be enjoined from appropriating another's trade name. Thus when the manufacturer of "Aunt Jemima" self raising flour has by advertising and persistent usage built up consumer acceptance, if other manufacturers should sell "Aunt Jemima Maple Syrup" or "Aunt Jemima Yeast" these actions have been held to be injurious to the original manufacturer, even though the appropriators were not directly diverting customers from the owner of the trade name.¹

However, the Federal Trade Commission has no direct jurisdiction over unfair competition where the owner of the trade name and the infringers are not competitors, but only in the sense that the practice is unfair to the competitors of the appropriator, rather than to the owner of the trade name.²

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1. Aunt Jemima Mills Co. vs. Rigney & Co., 247 Fed. 407 (C.C.A.2d.) 1917.
 2. Willys-Overland Co. vs. Akron-Overland Tire Co. (D.C.Del.) 268 Fed. 151, 1920.

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Misbranding.

Misbranding of goods offered for sale is the second in the category of deceptive and dishonest practices. In a leading case it was held by the Circuit Court of Appeals for the Sixth Circuit that a manufacturer could not be enjoined from misbranding his goods, at the suit of a vendor of competing articles which were honestly branded. Thus despite the fact that an unscrupulous dealer can deceive the public as to the ingredients and character of his wares at the expense and reputation of all honest dealers in the business, he cannot be restrained by a court of equity, because the injury is not directed against any specific competitor.¹

It is in this that the Federal Trade Commission has done valuable and effective work. The Supreme Court has sustained fully its contention that injury to a specific competitor is not necessary to its jurisdiction, and that it has full authority to deal with any case in which a deceptive practice is used in competition, in interstate commerce.² It has been computed that of the eleven hundred and ninety seven complaints filed prior to June, 1924, over four hundred dealt with some form of misrepresentation.³

A typical case is one in which a product is sold under the name of a well-known material, although in fact it contains largely or even exclusively a cheaper material. The Commission has found such practices to be "misleading" and

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1. Am. Washboard Co. vs. Saginaw Co. (C.C.A. 6th), 103 Fed. 281, 1900 (wherein it was charged that the defendant sold washboards under the name "aluminum" whereas in fact the boards contained no appreciable traces of aluminum.)
 2. F.T.C. vs. Winsted Hosiery Co. 258 U.S. 483--1922.
 3. National Industrial Conference Board, pgs. 112-117. Henderson pgs. 182-187.

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Thus the most recent report of the Commission lists a series of cases where orders were issued on manufacturers claiming goods to be silk, when they were actually composed in part of rayon. Again two New York stores were ordered to cease using the British Royal Coat of Arms in connection with the featuring of their merchandise and employing the names of well-known and long-established English manufacturers on goods produced by themselves.²

"Passing-Off"

In another group of cases the misrepresentation was found to consist in passing off second hand or rebuilt articles as new.³ The Commission's complaint is generally made only where there are published advertisements claiming the product to be new. The Commission has required that rebuilt or reconstructed tires, typewriters, etc., must be plainly marked as such and has forbidden advertising to the contrary. Upon statements regarding actual physical pro-

1. F.T.C. vs. Winsted Hosiery Co. 258 U.S. 483--1922.

2. Report for Fiscal Year ending June 30, 1938.

3. Henderson pgs. 195-196; Nat. Ind. Conf. Board pg. 120.

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2. Report for Fiscal Year ending June 30, 1928.
3. Henderson vs. 192-192; Nat. Ind. Conf. Board pg. 120.

perties of merchandise, the Commission rightly protects the public interest, but to forbid all "puffing" of wares by manufacturers and dealers, and to attempt to achieve standards of absolute honesty in advertising would invoke a paternalistic bureaucracy.

In certain lines such as razors, cheap fountain pens, pocket knives there have been widespread practices of marking up prices three or four times the price the retailer actually expected to get for the product, and later crossing out this fictitious price and writing a lower price under it. This is of course a readily accepted policy in certain lines, but the Commission has stepped in where the article in question is a standard manufactured article, turned out in large quantities in uniform kinds and sizes. If the printed or engraved price is admittedly fictitious, and put on the article solely to give the customer the impression that he is paying much less than the price the manufacturer expected to get, the Federal Trade Commission has found reason to intervene.

In the years following the war, the government had to liquidate large quantities of materials, and numerous traders offered goods alleged to be "Government" supplies.¹ The Commission was very active in eradicating this practice; as well also of the practice of claiming that certain articles had been "adopted" or "approved" by the Government or a Govern-

1. Henderson pgs. 198-199; Nat. Ind. Conf. Board pg. 121-123.

mental department. In the single case of this type to be appealed to the courts, the Circuit Court of Appeals upheld fully the findings and order of the Commission.¹

Disparagement of Competitors.

"Combination Sales" and "Leaders" occurred during the era of the sugar shortage of war days. When sugar was being rationed out at fixed prices some dealers devised the "combination order" where the customer bought a certain amount of sugar at the fixed price on the condition that he also buy a stated amount of other supplies upon which the margin of profit to the dealer was larger.

In the leading case attacking the practice of selling sugar below cost in combination with other products, by a mail order house, The Commission took the position that it was unlawful to sell merchandise in interstate commerce at less than cost, on the condition that at the same time the customer purchase other merchandise on which the dealer makes a profit. The complaint charged that the sales were made "with the purpose, intent and effect of harassing and embarrassing its competitors, and destroying their trade and stifling competition." The Circuit Court, however, rejected the theory that the Commission had the power to stop loss leader selling. The Court said "we find in the statute no intent on the part of Congress, even if it has that power, to restrain an owner of property from selling it at any price

1. F.T.C. vs. Guantee Veterinary Co., 285 Fed. 853 (1922).

mental agreement. In the absence of this type of an agreement, the Circuit Court of Appeals has held that the plaintiff and order of the Commission.

Measurement of Compensation

"Conditioned Sales" and "Resale" agreements during the war of the sugar shortage of war days. When sugar was being rationed and its fixed prices were being paid the "conditioned order" where the purchaser bought a certain amount of sugar at the fixed price on the condition that he also buy a stated amount of other supplies upon which the margin of profit in the latter was larger.

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that is acceptable to him or from giving it away."¹

At the same time the courts upheld the right of the Commission to prohibit advertising which claimed that the dealer was offering staple goods (in this case sugar), at a low price, because they could buy it more cheaply than the ordinary dealer, and secondarily the implications or suggestions in the advertisements that the other goods sold in combination with the staple were also considerably below the average market price as charged by various competitors. "...petitioner intentionally injured and discredited its competitors by falsely leading the public to believe that the competitors were unfair dealers in sugar and other commodities which petitioner was offering in connection with sugar."²

Cases were as in the Sears case, advertising carried the implications that the competitors were not efficient or were profiteering, are known as "disparagement". This is not a legal term and precise definitions are difficult and delicate. The Commission has found to be false such statements as in two cases where the respondents, who were mail order houses had advertised that the "regular" lumber dealers were members of the "Lumber Trust".³

Cases where respondents had circulated newspaper prints of competitors having been found guilty of violating

1. F.T.C. vs. Sears, Roebuck & Co. 1 F.T.C.D. 163 (1918);
258 Fed. 307 (1919).

2. Ibid.

3. F.T.C. vs. Chicago Mill Works Supply Co. 1 F.T.C.S.488.(1919)
F.T.C. vs. Gordon-Van Tine Co. 1 F.T.C.D. 316 (1919)

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Cases where respondents had obtained newspaper

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1. P.T.C. vs. Sears, Roebuck & Co. 1 P.T.C. 223 (1918);

228 Fed. 607 (1915).

2. Ibid.

3. P.T.C. vs. Chicago Mill & Lumber Co. 2 P.T.C. 488 (1919)

P.T.C. vs. Gordon-Lake Co. 2 P.T.C. 215 (1919)

the Sherman Law,¹ and where a mail order house had referred in exulting language in their advertisements to Federal Trade Commission's proceedings against "regular dealers" have brought complaints from the Commission; as well also in the case where a company circulated a news clipping telling of an application for appointment of a receiver of the assets of a competitor.²

Secret Commissions.

Secret commissions to dealers which resulted in "pushing" of particular products by the dealers, who at the same time pretended to be impartial concerning the various brands, have been condemned by the Commission. A number of cases condemn the practice of giving cash bonuses to salesmen in retail establishments for "pushing" particular lines--with the knowledge of the salesmans employer, (which is to be distinguished from commercial bribery, where the employer is not aware of such moves). However, the Circuit Court annulled an order condemning this practice--rejecting the argument that the consumers were misled by the failure to disclose the salesmans special interest.³ The natural consequences of the Commission's theory would lead to a posting of profit schedules and similar business secrets; moreover

1. F.T.C. vs. Wayne Oil Tank and Pump Co. 1 F.T.C.D. 259 (1919.)

2. F.T.C. vs. Sunlight Creameries, 4 F.T.C.D. 55 (1921).

3. Kinney-Rome Co. vs. F. T. C., 275 Fed. 665 (1921).

it is generally felt that the customer should hold the salesman as a party biased by self interest and not an impartial professional adviser.

Certain whole trades have been at various times been permeated by forms of commercial bribery; thus in chemicals, dyes, paints and varnishes trades at one time the custom was widely prevalent of expecting the dealer to give to the buyer or superintendent of their customers, secret "commissions" on purchases; ships stewards and chief engineers should get his five or ten percent from the Chandler who supplied the ships stores. Published findings of the Commission in these cases generally confine themselves to the bare statement that the respondent firm is engaged in selling in interstate commerce; that it is in active competition with other firms; and that in the course of its business, respondent "for several years last past has given cash gratuities to employees of its customers, without the knowledge or consent of their employers and without other consideration therefor, as an inducement to influence their employers to purchase respondents products and to refrain from purchasing the products of its competitors."¹

In the case of a ship Chandler in Savannah it was found that cash gratuities to ships officers amounted to approximately five percent of the total volume of sales of ships supplies, in addition to approximately two and a half

1. Henderson pg. 218.

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percent spent for entertainment.¹ A Galveston Chandler paid five percent of all invoices to ships officers.² A British dye company doing an annual business in United States of about \$700,000 paid an average over a three years period from \$40,000 to \$50,000 per year.³

Miscellaneous Cases.

The Federal Trade Commission has also issued complaints in "miscellaneous" cases of deceptive and misleading character. Thus it has condemned such practices as commercial espionage, enticement of competitors employees, setting up of bogus independents, threatened litigation, misrepresentation of trade status (thus claiming to be a manufacturer falsely), misrepresentation of origin of products, thus "Cordova" leather, "Havana" cigars, and "Sheffield" silver.⁴ Thus March 17, 1938 the Sheffield Silver Company of New Jersey filed with the Second Circuit Court its petition to set aside the order of the Commission to cease using the word "Sheffield" in its corporate name, or in any manner, so as "to represent or imply that its electroplated products were 'Sheffield' or made by the Sheffield process, which originated in England about two hundred years ago."⁵

1. F.T.C. vs. Thomas Duggan & Son, 3 F.T.C.D. 316 (1921)

2. F.T.C. vs. John Locke, 3 F.T.C.D. 320 (1921)

3. F.T.C. vs. United Indigo and Chemical Co. Ltd., 3 F.T.C.D. 425 (1921)

4. Henderson, pgs. 226-227; NAT. Ind. Con. Bo., pg. 128.

5. F.T.C.--Report, 1938.

While the Commission has done considerable and valuable work in cases of the foregoing nature, nevertheless there are certain obvious limitations with regard to its work along these lines.

Cases of "passing off" and deceptive advertising and misrepresentation directed against the names of rivals are more speedily and more satisfactorily settled by private litigation, unless of course there are other special factors which make action too difficult.

Where the practice in question falls within the scope of the Pure Food and Drugs Act, the Department of Agriculture is better equipped to handle it since it has the more scientific personnel, and may prosecute criminally, while the Commission can only issue a desist order, and cannot force forfeiture of the unlawful gains derived from the violation.

Where the issue involved is not general, but only sporadic, the Commission's inability to move rapidly militates against invoking its assistance if any other available remedy exists.

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VI. THE COOPERATIVE TREND IN AMERICAN BUSINESS

Trade Associations.

"A trade association is an organization of producers or distributors...upon a mutual basis for the purpose of promoting the business of their branch of the industry, and improving their service to the public through the compilation and distribution of information, the establishment of trade standards, and the cooperative handling of problems common to the production or distribution of the commodity or service..."¹

Advocates of the trade association movement have claimed that it is a necessary aid to our competitive system, since one of the essential elements in the competitive system is that buyers and sellers should be fully informed as to existing conditions in the market.² Expansion of markets from local scales to national and international fields have made it increasingly difficult to secure accurate and comprehensive information as to basic market conditions. Hence, it is claimed, trade associations through their statistical exchanges perform the function of disseminating knowledge of the factors of supply and demand.

Activities of trade associations have been divided into three categories:

(A) Certain of these activities do not affect competitive conditions, and are generally agreed to be beneficial and proper; thus joint commercial and industrial research, education in cost accounting, stimulation of demand by

1. Definition of a Special Committee, Am. Trade Asso. Executives, 1922.

2. Franklin D. Jones--Business Statistics as a Means of Stabilizing Business (Pro. Acad. Pol. Sci. January, 1926, pgs. 46-56.)

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 2. Franklin E. Jones--Business Statistics as a Means of Stabilizing Business (Pro. Acad. Pol. Sci., January, 1933, pgs. 44-55).

joint advertising and publicity, arranging for cooperative insurance, providing shipping traffic bureaus, improving relations with employees, arbitration of commercial disputes, representing the industry in public matters.

(B) Certain activities are certainly illegal; thus price fixing, curtailment of production, and allocation of territory.

(C) Certain activities are border-line; thus those tending to stabilize business and standardize prices, the collection and dissemination of trade statistics, standardization of products and trade practices, and the adoption of uniform cost accounting systems.¹

Legal Status.

This tendency towards cooperation was regarded for years, with a suspicious eye by the Department of Justice, which shared perhaps the dictum of Adam Smith that "when people of the same trade meet together... the conversation ends in a conspiracy against the public or in some contrivance to raise prices."² Civil and criminal proceedings by the Attorney-General brought about the Supreme Court declaration that price-exchanging practices were unlawful where they were part of plans for price uniformity.³

Two later Supreme Court decisions held that the col-

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1. Geo. Roberts, Present Legal Status of Trade Associations and their Problems. Ibid. Pgs. 5-18.
 2. Burns, The Decline of Competition, pg. 43.
 3. U.S. vs. American Column & Lumber Company, 257 U.S. 377 (1921).

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1. See Roberts, *Present Legal Status of Trade Associations*
 and their Predecessors, 1914, 1915.
 2. *Board of Trade v. Board of Education*, 1911, 1912.
 3. *U.S. v. American Cyanamid Co.*, 257 U.S. 297
 (1921).

lection of information about prices in concluded transactions, and the dissemination of such information without identification, did not violate the Sherman Law, where there was no evidence that such a collection was part of an implied agreement to establish uniform prices; also that the existence of approximate uniformity of prices in an industry was not evidence of any such agreement, since price uniformity was a normal outcome of free competition in standardized commodities.¹

The Supreme Court has now gone to the limit of holding that "the mere fact that the parties to an agreement eliminate competition between themselves is not sufficient to condemn it."² After the Court had mentioned the particular conditions of the bituminous coal industry, with its excess capacity, its difficulties in meeting competition from oil, gas and water power, and its "chaotic conditions", it stated, "the fact that the correction of abuses would lead to fairer price levels does not mean that abuses should go uncorrected or that cooperative endeavor to correct them necessarily constitutes an unreasonable restraint of trade."

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1. Maple Flooring Manufacturers Asso. vs. U.S., 268 U.S. 563 (1925)
Cement Manufacturers Protective Association vs. U.S., 268 U.S. 588 (1925).
 2. Appalachian Coals Inc. vs. U.S., 288 U.S. 344, 360 (1933).

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1. *Maple Flooring Manufacturers Assn. v. U.S.*, 298 U.S. 563 (1936).
 2. *Grain Processing Association v. U.S.*, 302 U.S. 344 (1937).
 3. *Apalachicola Coast, Inc. v. U.S.*, 302 U.S. 544 (1937).

Trends

The types of work of trade associations are diverse; Industrial research, interchange of credit information, common advertising, standardization of forms of cost accounting and methods of calculating costs, statistics of production, inventories, unfilled orders, productive capacity and selling prices, cooperative control of output, and control of types of, product and methods of selling are some of their activities.

Growth of the trade association movement was due unquestionably to the reaction of businessmen to the "killing pace" of competition. During the War period, American business learned the value of organization and a systemized plan of co-operation. Under war-time legislation, the War Industries Board, the Food Administration, the Railroad Administration, and the Capital Issues Commission imposed upon industry a measure of economic planning. Aspects of this were the co-ordination of productive and distributive capacities, and systemization of effort to serve the common purpose, while government control supplied the police power of enforcement.

"Business came out of the War with the realization of what it could do in the way of profitable production and distribution, if it were relieved from some of the more destructive connotations of free competition and were permitted a reasonable latitude in individualistic cooperation.

"Whereas up to 1917, the solution of the economic problem was generally assumed to lie in a greater freedom of competition, and a wider scope of anti-trust laws, from 1920 on, the search took a new direction--viz., regulated competition, systemization of methods, and within the terms of this system, an individualistic coordinated effort along perceived lines. It is not collectivism; but postulates freedom and continuity of individual action, although within the common requirements or rules of regulated competition."¹

1. The Regulation of Competition, Nelson B. Gaskill, pg. 112.

The types of work of trade associations are diverse:

Industrial research, interchange of credit information, common advertising, standardization of forms of cost accounting and methods of calculating costs, assistance of production, inventory, unified orders, productive capacity and selling prices, cooperative control of output, and control of types of products and methods of selling are some of their activities. Growth of the trade association movement was the up-

questioning in the reaction of businessmen to the "illness" of competition. During the war period, American business learned the value of organization and a systematic plan of co-operation. Under war-time legislation, the War Industries Board, the Food Administration, the Railroad Administration, and the Capital Issues Committee imposed upon industry a measure of economic planning. Aspects of this were the coordination of productive and distributive capacities, and systematization of effort to serve the common purpose. While government control supplied the police power of enforcement, "Business came out of the war with the realization of what it could do in the way of profitable production and distribution. It was relieved from some of the more destructive consequences of free competition and was permitted a reasonable latitude in individualistic cooperation."

Thence up to 1917, the regulation of the economic problem was generally assumed to lie in a greater freedom of competition, and a wider scope of anti-trust laws. From 1918 on, the search took a new direct course. Legislation, regulation, and control of output, and within the limits of this system, individualistic cooperation, all along the production line. It is not collectivistic, but collectivistic in its aim. It is not a system of individual action, although within the common requirements or rules of regulated competition.

Trade Practices Conferences.

Shortly after the War, the Commission inaugurated the policy of declaring of particular practices to be within the category of unfair competition.¹ From this grew the practice of members of an industry meeting under the auspices and direction of the Commission, to draw up rules of conduct which they would submit to the Commission as declaration of fair and proper trade practice. In 1926, a special division of the Commission was set up to supervise trade conferences.

"...Clarification and codification of legal requirements and the organization of such cooperative endeavor under supervision of the Commission in the elimination of undesirable practices and the maintenance of fair competitive conditions is of vast importance to industry, to the public, and to the Government. It leads to the wholesale elimination and abandonment of unfair and illegal methods of competition, thereby bringing to legitimate business and the purchasing and consuming public relief and protection from harmful exploitation and the wastes and burdens of such methods. This voluntary cooperation in the elimination of harmful practices also effectuates a large saving to the Government...in legal proceedings..."²

The number of these conferences rose from 10 in 1928, to 31 in 1929, to 57 in 1930 and then fell in 1931 to 14. The reason for the mushroom growth of the movement was the wide publicity given in trade magazines, and the attitude of the Commission, who in their report in 1926 stated; "The Division will not only extend and enlarge the scope of future conferences, but will also give attention to the operation of rules heretofore adopted at conferences held

1. Gaskill, pgs. 112-122.

2. F.T.C.--1938 Annual Report.

Trade Practices Conference

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"...Distortion and collision of legal requirements and the organization of such cooperative endeavor under supervision of the Commission in the elimination of undesirable practices and the maintenance of fair competitive conditions is of vast importance to industry, to the public, and to the Government. It leads to the wholesale elimination and abandonment of unfair and illegal methods of competition, thereby bringing to realistic business and the purchasing and consuming public relief and protection from harmful practices and the waste and burden of such practices. This voluntary cooperation in the elimination of harmful practices also affords a large saving to the Government....in legal proceedings...."

The number of these conferences rose from 10 in 1935, to 21 in 1936, to 27 in 1937 and then fell in 1938 to 16. The reason for the enormous growth of the movement was the wide publicity given to trade agreements, and the attitude of the Commission, who in their report to 1935 stated: "The Division will not only extend and enlarge the scope of future conferences, but will also give attention to the operation of rules heretofore adopted at conferences held

in the past...If adopted or sanctioned by the Commission, the action of the industry becomes the rule of business conduct for the industry on the subject covered."¹

This was the undoubted cause of misleading impressions in trade circles (widely advertised by trade papers and chambers of Commerce), because the Commission actually had neither the power of approval or sanction on numerous practices, because of judicial limitations. The powers of the Commission are limited to prevention or the occasional corollary power of a negative administrative sanction or approval (thus by the Commission's refusal to issue a complaint on a particular occasion.)

The Trade Practice Conference "Bubble" of this period was broken (on the word of a former Commissioner) by pressure from the Department of Justice, which saw a threat to the Sherman Law in the tendencies of the movement.²

The Department of Justice during the Hoover administration frankly indicated that its attitude towards trade association activities would be that of skepticism. Attorney General Mitchell said, January, 1930, that the anti-trust laws would be prosecuted vigorously.

"There have been many changes in economic conditions since these statutes have been passed, and much discussion has arisen as to whether some modification of them is desired to meet modern business conditions. The anti-trust laws are founded on the proposition that the avenues of in-

1. F.T.C. Annual Report--Year ending June 1926.

2. Gaskill, pgs. 120-125.

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are founded on the proposition that the interests of in-

dustrial opportunity must be kept open as far as possible to the initiative of the individual citizen.."¹

It has been pointed out, however, that the eagerness of American business for certain modifications in the field of competition was well demonstrated by their speed in adopting the Codes of Fair Trade Practice under the late National Industrial Recovery Act.

1. Am. Bar Asso. Journal, January 1930, pgs. 1-30.

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ness of American business for certain modifications in the

field of competition was well demonstrated by their speed

in adopting the Code of Fair Trade Practice under the late

National Industrial Recovery Act.

VII. RECENT LEGISLATIVE TRENDS

Before discussing the activities of the Federal Trade Commission with regard to practices which tend to restrain trade, it is necessary to consider the further Congressional evolutions of the anti-trust policy.

The Export Trade Act.

The Export Trade Act, approved April 10, 1918, known also as the Webb-Pomerene Law provides that nothing contained in the Sherman Law shall be construed as declaring to be illegal any combinations or "associations" entered into for the sole purpose of engaging in, and actual solely engaged in, export trade or agreements or acts done in export trade by such associations, unless the effect of such actions tend to restrain trade or substantially lessen competition within the United States.¹

"An export trade association must be entered into for the sole purpose of engaging in export trade from the United States to foreign nations. It may not produce, manufacture, or sell for consumption or resale in the domestic market; nor may it enter into any agreement or conspiracy, in restraint of trade within the United States or in restraint of the foreign exports of a domestic competitor. Such association must not either in the United States or elsewhere enter into any agreement or conspiracy or do any act which artificially or intentionally enhances or depresses prices within the United States of the commodities of the class exported by such associations...The prohibition against unfair methods of competition contained in the Federal Trade Commission Act is extended to competitors engaged in export trade even though the acts constituting such unfair methods are done without the territorial jurisdiction of the United States."²

1. Pub. No. 126, 65th Congress.

2. Report of the F.T.C. June 30, 1938.

VII. EXPORT RESTRICTIONS

Before discussing the activities of the Federal

Trade Commission with regard to export trade, it is necessary to consider the further development of the export trade policy.

The Export Trade Act

The Export Trade Act, approved April 10, 1918,

known also as the Webb-Pomeroy Law provides that nothing contained in the Sherman law shall be construed as declaring to be illegal any combination or "association" entered into for the sole purpose of engaging in, and actually engaged in, export trade or agreements or acts done in export trade by such associations, unless the effect of such action tend to restrain trade or substantially lessen competition within the United States.¹

"An export trade association must be entered into for the sole purpose of engaging in export trade from the United States to foreign countries. It may not produce, manufacture, or sell for consumption or resale in the domestic market; nor may it enter into any agreement or conspiracy, in restraint of trade within the United States or in restraint of the foreign export of a domestic commodity. Such association must not either in the United States or elsewhere enter into any agreement or conspiracy or do any act which artificially or substantially enhances or depresses prices within the United States of the commodities of the class exported by such associations.... The prohibition against unfair methods of competition contained in the Federal Trade Commission Act is extended to competitors engaged in export trade even though the acts constituting such unfair methods are done without the territorial jurisdiction of the United States."²

1. Pub. No. 126, 65th Congress.
2. Report of the F.T.C. June 30, 1918.

These associations are required to file annual reports and papers with the Commission.

Forty four associations were on file with the Federal Trade Commission at the close of the fiscal year, June 30, 1938.¹

In discussing the Webb-Pomerene Act, Senator Frank B. Kellogg said: "The question is not whether the principles of the Sherman Act ought to be applied to all the world. The fact is those principles are not applied in foreign countries where we must meet the competition of foreign manufacturers and merchants, and if we have the power to do so, it is unwise to try to enforce against our merchants dealing in those countries rules which are not enforced against their foreign competitors."²

In the debates in both houses the fact was stressed that it would make it possible for small American exporting firms to reduce their selling costs, thereby enabling them to compete in foreign markets, whereas large corporations such as United States Steel and International Harvester Company needed no such assistance and would have no occasion to resort to the methods permitted by the new law.

The Packers and Stockyards Act.

The Packers and Stockyards Act--"an Act to regulate interstate and foreign commerce in live stock products, dairy products, poultry, poultry products, and eggs and for other purposes"--was approved August 15, 1921.³

This followed a bitter and protracted struggle be-

1. Report of the F.T.C. June 30, 1938.
2. 56 Cong. Rec. 107.
3. 42 Stat. 1.159.

These associations are reported to this annual

report and agree with the Commission.

Twenty-four associations were on file with the

Federal Trade Commission at the close of the fiscal year.

June 30, 1934.

In discussing the Webb-Pomeroy Act, Senator

Frank E. La Follette said: "The question is not whether the
principles of the Sherman Act should be applied to all
the world. The fact is that principles are not applied
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products, poultry, poultry products, and eggs and for other

purposes--was approved August 12, 1921.

This followed a bitter and protracted struggle be-

tween the packers and the Federal Trade Commission. The investigation was inaugurated by the Commission in 1917 at the order of the President, and the report stated that there was no competition in buying livestock between the five major packing companies, and recommended that the private car lines of the packers be taken over by the transportation agencies, and that the Railroad Administration, a government war time agency, acquire the more important stockyards. The packers submitted to a consent decree February 27, 1920, requiring them to refrain from monopolistic practices, to dispose of their large interests in non-live stock products, to sell their railroads, retail stores and stockyards, and to submit to continuous inquiry about their business conduct thereafter.

Through this Act the stockyards were subjected to regulation of rates and practices as public service corporations while the packers were continued under the prohibitions and provisions of the anti-trust laws, to which were added prohibition of certain unfair or monopolistic practices which were considered especially reprehensible or dangerous in the packing business. The Federal Trade Commission was relieved of all jurisdiction over the industry and the Secretary of Agriculture was given authority to regulate the stockyards, and to consider complaints of violations by the packers of the laws against improper trade practices, and to issue cease and desist orders against such practices.

The Capper Volstead Act.

The Capper-Volstead Act--"an act to authorize association of producers of agricultural products"--approved February 18, 1922.¹ Agricultural producers were expressly authorized to form associations to control their marketing operations, thereby being relieved of the threat of prosecution under the Sherman Law. A provision allowed the Secretary of Commerce to enter a restraining order if he should find any such association restraining trade to such an extent as to "unduly enhance" prices.

The National Industrial Recovery Act.

The National Industrial Recovery Act--"An Act to encourage national industrial recovery, to foster fair competition, and to provide for the construction of useful public works, and for other purposes"--was approved June 16, 1933.²

The Act stated in part: "It is the policy of Congress to remove obstructions to the free flow of interstate and foreign commerce which tend to diminish the amount thereof;..to provide for the general welfare by promoting the organization of industry for the purpose of cooperative action among trade groups, to induce and maintain united action of labor and management under adequate governmental sanctions and supervision, to eliminate unfair competitive practices.....

"Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code or codes of fair competition for the trade or industry... After the President shall have approved any such code, the provisions of such code shall be standards of fair competition for such trade or industry...

1. 42 Stat. 1.388

2. Pub. No. 67--73d. Cong.

The Upper Volstead Act--An act to authorize

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"Upon the application to the President by one or more trade or industrial associations or groups, the President may approve a code of fair competition for the trade or industry.... After the President shall have approved any such code, the provisions of such code shall be standards of fair competition for such trade or industry...."

"The President is authorized to enter into agreements with and to approve voluntary agreements between and among, persons engaged in a trade or industry, labor organizations, and trade or industrial organizations, associations or groups, relating to any trade or industry, if in his judgement such agreements will aid in effectuating the policy of this title (viz. industrial recovery) with respect to transactions in or affecting interstate or foreign commerce..."

The Robinson-Patman Act.

The Robinson-Patman Act--"An Act to supplement existing laws against unlawful restraints and monopolies and for other purposes"--was approved June 19, 1936.¹

The Act stated in part; "It shall be unlawful for any person engaged in commerce...either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality,....where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce. ... Provided, that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities ... are sold or delivered....Provided further that nothing herein contained shall prevent persons engaged in selling goods....from selecting their own customers in bona fide transactions... further, That nothing herein contained shall prevent price changes from time to time...in response to changing conditions....

"Nothing herein shall prevent a seller from rebutting the .. case (against him) by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

"It shall be unlawful for any person engaged in commerce,...to be a party to, or assist in, any transaction... which discriminates to his knowledge against competitors...

"Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than \$5,000 or imprisoned not more than one year, or both..."

1. Public-No. 692--74th Cong.

"The President is authorized to enter into agreements with and to approve voluntary agreements between and among persons engaged in a trade or industry, labor organization, and trade or industrial organization, association or group, relating to any trade or industry, if in his judgment such agreements will aid in effectuating the policy of this title (viz. industrial recovery) with respect to transactions in or affecting interstate or foreign commerce..."

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"Nothing herein shall prevent a seller from requesting the... case (against him) by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith in meeting a special price of a competitor, or the services or facilities furnished by a competitor..."

"It shall be unlawful for any person engaged in commerce... to be a party to, or assist in, any transaction... which discriminates on the basis of a buyer's identity..."

"Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than \$5,000 or imprisoned not more than one year, or both..."

The Miller-Tydings Act.

The Miller-Tydings Resale Price Maintenance Act--

"An Act to provide additional revenue for the District of Columbia, and for other purposes"--was approved August 17, 1937.¹ (The reason for the wording of this bill was that the bill was passed as a "rider" to a bill providing for appropriations for the District of Columbia.)

This Act amended the Sherman Act, providing that nothing in the Sherman Act "shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity....Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on commodities herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers,...factors,...retailers,...persons, firms, or corporations in competition with each other."

The Wheeler-Lea Act.

The Wheeler-Lea Act--a purely amendatory act incorporated and integrated wholly in the Federal Trade Commission Act--was approved March 21, 1938.²

This Act specifically made unlawful the dissemination of false advertisements of food, drugs, devices or cosmetics. The Federal Trade Commission was also empowered to bring suit in a United States District Court to enjoin publication of such false advertisements pending final disposition of the matter under the complaint. The Act also

1. Public--No. 314--75th Cong.

2. Public, No.447, 75th Cong.

The Miller-Tydings Act.

The Miller-Tydings Act--

"An Act to provide additional revenue for the District of Columbia, and for other purposes"--was approved August 17, 1935.¹ (The reason for the wording of this bill was that the bill was named as a " rider" to a bill providing for appropriations for the District of Columbia.)

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nothing in the Sherman Act "shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity.... Provided further, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on commodities herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers.... Except....retailers....persons, firms, or corporations in competition with each other."

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1. Public--No. 515--75th Cong.
2. Public, No. 447, 75th Cong.

provided that an order of cease and desist becomes final sixty days after its issuance unless within that period the respondent petitions the United States Circuit Court of Appeals to review the order. (Previously such an order would not become final until the Commission had applied to the Circuit Court for an order to command obedience to the complaint.)

VIII. THE FEDERAL TRADE COMMISSION and MONOPOLISTIC PRACTICES

With these various trends of federal anti-trust policy in mind, let us look at the activities of the Federal Trade Commission with regard to those practices which are considered in restraint of trade.

Unfair Price Practices

In the category of unfair price practices are contained, local price cutting by large-scale units; "fighting brands"; "fighting companies" namely those organized for punitive purposes rather than for the conducting of legitimate business. In cases of price cutting below cost the question is obviously extremely complicated; thus such factors have to be considered as to what constituted the various components of costs, fixed, operating or continuing; in a rapidly falling market a company with a large inventory may have to sell at a loss in order to liquidate with less serious loss; again a company seeking to utilize its plant more fully may have to cut prices to a degree; hence it is often necessary to judge motives, and hence states of mind.

The Commission in the Fleischmann case seemingly accepted the principle that while prices may be cut in a particular locality to get business from a competitor, or to retain it, it must not be reduced under the competitors prices. This is of dubious legality, since the immediate effect of price cutting is the increasing of competition, rather than its lessening.¹

1. F.T.C. vs. Fleischmann Co., 1 F.T.C.D. 119.

The Commission is not well equipped to handle such cases. In one case where the buccaneering tactics of a large rendering company forced a smaller competitor out of business, the process was too lengthy to save the smaller company, and the final order was not made out until nearly four years after it had been absorbed by the Trust.¹ In effect all the Commission could do was to admonish the company from pursuing similar tactics in the future, and even then the respondents were under no legal duty to obey this order until a decree had been entered in the Circuit Court of Appeals. Thus it would seem that a private suit for damages, or if the facts of the case warrant it, a criminal indictment, would more adequately protect private and public interests.

Price Discriminations. It is in the larger field of price discrimination, however, that the problem becomes intricate to the extreme. This question arises where a manufacturer is selling to both wholesale and retail establishments; the growth of such distributive agencies as chain stores and cooperatives has further complicated policies which attempt to settle the problem along the traditional functional lines.

The Federal Trade Commission has taken the position that all discounts based upon the classification of purchasers on functional lines are illegal.² In the Mennen case the

1. F.T.C. vs. Am. Agricultural Chemical Co., 1, F.T.C.D. 226(1918).
2. F.T.C. vs. Mennen Co. 4 F.T.C.D. 258; C.C.A. 2d. 288 Fed. 774; 263 U.S. 759.

The Commission is not well equipped to handle such cases. In one case where the manufacturing facilities of a large manufacturing company forced a smaller competitor out of business, the process was too lengthy to have the smaller company, and the final order was not made out until nearly four years after it had been absorbed by the larger. In almost all the Commission cases it was to abandon the company from entering similar facilities in the future, and even then the respondents were under no legal duty to obey this order until a decree had been entered in the Circuit Court of Appeals. Thus it would seem that a private suit for damages, or if the facts of the case warranted it, a criminal indictment, would more adequately protect private and public interests.

Price Discrimination. It is in the larger field of price discrimination, however, that the problem becomes intricate to the extreme. This question arises where a manufacturer is selling to both wholesale and retail establishments; the growth of such distinctive agencies as chain stores and co-operatives has further complicated policies which attempt to serve the wholesaler and the traditional functional lines.

The Federal Trade Commission has taken the position that all discounts based upon the classification of purchasers as functional lines are illegal. In the known case the

1. F.T.C. vs. Am. Agricultural Chemical Co., 7 F.T.C. 226 (1915).
2. F.T.C. vs. National Co. # F.T.C. 228; D.C. 226 Fed. 714.
363 U.S. 759.

Commission found that the respondents, discounting along functional lines, tended to drive cooperative druggist associations from the field, (since they held the cooperatives to be retailers, and not eligible for wholesale discounts), and hence to lessen competition. The Commission concluded that both the Federal Trade Commission and the Clayton Acts were being violated, and ordered the company to cease and desist "from discriminating in net selling prices, by any method or device, between purchasers of the same grade, quality or quantity of commodities, upon the basis of the classification of its customers as 'jobbers', 'wholesalers', or 'retailers', or any similar classification which relates to the customers form of organization..."

The order of the Commission was set aside by the Circuit Court, and a writ of "certiorari" to review the courts decision was denied by the Supreme Court, the Court finding that there was no evidence of monopoly on the part of the company, or that there had been any deception, misrepresentation or oppression.

The Federal Trade Commission ordered the National Biscuit and Loose-Wiles companies to cease granting quantity discounts to chain systems, finding that the chains "were allowed...to combine the purchases of all the separate units...for the purpose of receiving larger discounts, but the companies refused to allow associations of independent retailers,...to purchase through cooperative agencies." Moreover it was found as a fact that the cost of selling to the chains was the same as selling to a number of in-

Commission found that the respondents, discharging along functional lines, failed to make adequate arrangements from the field, (since they held the cooperative to be profitable, and not all for wholesale accounts), and hence to furnish necessities. The Commission concluded that both the Federal Trade Commission and the Clayton Act were being violated, and ordered the company to cease and desist "from discriminating in net selling prices, by any method or device, between purchasers of the same grade, quality or quantity of commodities, upon the basis of the classification of its customers as 'jobbers', 'wholesalers', or 'retailers', or on similar classification which relates to the character of the organization...."

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The Federal Trade Commission ordered the National Biscuit and Lumber-Wilson companies to cease practicing quantity discounts to chain stores, finding that the chain "were allowed...to obtain the benefits of all the separate units...for the purpose of receiving larger discounts, but the companies refused to allow resellers of independent retailers...to purchase through cooperative agencies." Moreover it was found as a fact that the case of selling to the chain was the same as selling to a number of in-

dependent retailers equal to the same number of chain units.¹

The Circuit Court revoked the Commission's order, and was upheld by the Supreme Court. The court stated "effective competition requires that merchants have freedom of action in conducting their own affairs."

While the traditional channels of trade persisted, price differentials between wholesalers and retailers were not particularly discriminatory; with the rise of large scale retailing and the distintegration of jobbing trades along sectional and local lines, volume of purchases no longer closely corresponded with the trade status of the buyer.

Allowance Discriminations. In the final report on the Chain Store Investigation by the Federal Trade Commission in 1935, it was found that the chains total buying advantage, including allowance discounts, was 1.73 percent over the wholesaler in the grocery field, and around 2.5 percent in the drug field.² (Figures were based on a survey of four cities by the Commission).

It was discovered however that "promotional allowances", namely payment for services such as window and counter displays, sales promotion efforts reached considerable totals for specific chain systems. Thus the Kroger Grocery and Baking Company received \$534,735 in 1934; the First National Stores Inc. received \$342,121 in that same year. General Foods Corporation allowed the Great Atlantic

1. F.T.C. vs. the National Biscuit Co. and the Loose-Wiles Biscuit Co. 836, 299 Fed. 733 (1924).

2. Final Report on the Chain Store Investigation, F.T.C. 1935.

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advantage, including allowance discounts, was 1.75 percent

over the wholesaler in the grocery field, and around 2.5

percent in the drug field. (Figures were based on a sur-

vey of four cities by the Commission).

It was discovered however that "promotional

allowances", namely payment for services such as window and

counter displays, sales promotion efforts reached consider-

able totals for specific chain systems. Thus the Kroger

Grocery and Baking Company received \$54,735 in 1934; the

First National Stores Inc. received \$342,121 in that same

year. General Foods Corporation allowed the Great Atlantic

I. F. T. C. vs. the National Biscuit Co. and the Loose-Wiles
Biscuit Co. 836, 299 Fed. 733 (1924).

2. Final Report on the Chain Store Investigation, F. T. C. 1935.

& Pacific Tea Company five percent off its list price for promotional service, and Standard Brands Inc. gave the same grocery firm \$12,000 per month for such services on yeast alone. Chains are better equipped to give advertising services than are wholesalers, for they have printed advertisements which reach numerous customers, window and counter displays, centralized policy assuring that a product will be featured in all the stores of a chain.

However some manufacturers make absolutely no effort to check on the recipients of an allowance to see if the money is actually used in the designated way. Thus the Kruger Company admitted that they made no reports to manufacturers granting them allowances; A. & P. stated that they were not responsible to General Foods for money given for promotional allowances, and that the allowance was simply placed in the general advertising account. Hence these allowances were regarded in some circles as nothing more than unfair and discriminatory practices.

In the same manner it was pointed out that certain volume allowances were discriminatory. Thus a manufacturer in foods used a plan of progressive discounting system according to volume, from ten cents per unit to twenty five cents. Investigation showed that only three companies (chains) bought in sufficient quantities to benefit from the type of scale in use. The Great A. & P. Company earned about \$2,000,000 in 1934 on brokerages alone.

The Robinson-Patman Act originated out of a desire to prevent chain stores and other large buyers from securing excessive and unconscionable advantages over their smaller competitors by virtue of mere size and purchasing power, irrespective of their actual efficiency or their real ability to serve the public.

The place of special interests in the history of the Robinson Patman law cannot be ignored.¹ The originators of the Act, generally known to be the United States Wholesale Grocers Association, (Congressman Patman acknowledged that its lawyers had drawn up the original draft), had for their avowed purpose to make it possible by statute to buy "one-twelfth of a dozen assorted" of nationally advertised food products at the same unit price as a train load. The original Bill sought to make it necessary for the manufacturer to sell each unit at the same price. He was to be allowed differing prices only if he classified his customers along the traditional functional lines. In other words those who sold for resale would be classified as wholesalers, and thus could be given a wholesale price. But those who sold to consumers would be classified as retailers, and could not be given wholesale prices, no matter how many units they bought. Actually the Act differed from the Bill, as it permits justifiable discounts for quantity, and payments for useful and demonstrable services delivered by a distributor for a manufacturer.

1. "Legislative History", Wheeler Sammons, pgs. 99-131 (Bus. & the R.P.Act).

Economic Aspects of Discrimination. It has been pointed out that small orders are usually "carried" by large orders; the opposite has usually been assumed to be true. Figures of one large company showed that over eighty percent of its orders accounted for only twenty five percent of its sales, and that nearly twenty percent of its orders are actually filled at a loss.¹

In one of the first cases to be heard by the Federal Trade Commission following the passage of the Robinson-Patman Act, the Montgomery-Ward--Bird Case, the cost of handling the Montgomery-Ward business was compared with the cost of handling a comparable amount of ordinary retailers orders.² The figures presented by a leading accounting firm, checked by the Commission's accountants, showed that the Bird Company was handling this mail order house account for 18.6%--the ordinary retailers comparable business cost 47.1%. The difference in price complaints was but 20%--the actual difference was 25%.

In the Kraft case it was complained that the Kraft Company gave a quantity discount on loaf cheese which amounted to two and a half cents in certain brackets.³

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1. Op. Cit., pg. 122, W. Sammons.
 2. In the Matter of Bird & Son Inc. F.T.C. 2 C.C.H. Fed. Trade Reg. Serv. 9060 (order issued July 17, 1937)
(It cost Bird \$5,719.76 to sell \$65,429.44 of its products to Mont.-Ward. It cost Bird \$25,365.40 to sell \$68,901.05, to small quantity buyers.)
 3. In the matter of Kraft-Phenix Cheese Corp. F.T.C. 20.C.C.H. Fed. Trade Prac. Serv. 9061. (order issued July 17, 1937).

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retail orders. The figures presented by a leading

accounting firm, checked by the Commission's accountants,

showed that the Bird Company was handling this mail order

house account for 18.64--the ordinary retail comparable

business cost 27.14. The difference in order handling was

but 306--the actual difference was 251.

In the Bird case it was contended that the

Bird Company gave a quantity discount of four percent which

amounted to two and a half cents in certain orders.

1. On July 1, 1937, 2. Boston.

2. In the Matter of Bird & Son Inc., 7 F.T.R. 2 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.

3. Bird, 9000 (order issued July 1, 1937).

(1) cost Bird 25.14, 75 to sell 25.14, 75 at the time

4. 25.14, 75 to sell 25.14, 75 at the time

5. 25.14, 75 to sell 25.14, 75 at the time

6. In the Matter of Bird & Son Inc., 7 F.T.R. 2 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.

7. 25.14, 75 to sell 25.14, 75 at the time

Evidence showed that delivery costs alone accounted for a difference of nearly four cents per pound.

Moreover these cases here mentioned did not involve any of the following items, all of which represent savings flowing from quantity orders; thus the importance of slack season orders; orders in advance of production; orders which allow advantageous purchases of raw materials; orders which enable the usage of plant facilities which would otherwise be idle; advance payment on account on orders, thus supplying needed working capital; orders not involved in guarantees to jobbers and other customers to replace obsolete stock, or to protect against price decline, or to return unsold goods.

In the question of special services such as promotion of a manufacturer's line, window and counter displays, demonstrators, preferred locations in stores, samples, premiums to employees, all have ramifications so diverse and complicated that the Commission must necessarily have considerable difficulty in giving a reasonable interpretation to the provisions against discriminatory service allowances. The Act requires that these allowances must be on a "proportionally equal" basis to all buyers; no objective criterion for the judging on proportionality is provided. Unquestionably advertising allowances and special promotional money had been handed out on an indiscriminate basis, with little regard to the actual performance that accompanied the payment, and very often these allowances became in

Witnesses showed that delivery costs were accounted for a difference of nearly four cents per pound.

Moreover, these cases were mentioned did not involve any of the following items, all of which represent savings flowing from quantity orders: (1) the transportation of stock across country; (2) order in advance of production; (3) orders which allow advantageous purchases of raw materials; (4) orders which enable the maker of latest facilities which would otherwise be lost; (5) advance payment on account of orders, thus supplying needed working capital; (6) orders not involved in circumstances of labor and other elements to replace obsolete stock, or to protect against price decline, or to return unsold goods.

In the case of special services such as inspection of a manufacturer's line, window and counter displays, demonstrators, repeated locations in stores, etc., leading to enquiries, all have facilities to give and coordinate that the Commission must necessarily have considerable difficulty in giving a reasonable interpretation to the situation against discriminatory service allowances. The Act requires that these allowances must be on a "proportionally equal" basis to all buyers; no objective criterion for the basis of proportionality is provided. In questionably advertising allowances and special promotional money has been treated on an individual basis, with little regard to the actual performance that accompanied the payment, and very often these allowances become an

effect price concessions to the large purchaser.

It has been stated that one of the immediate effects of the Robinson-Patman Act has been to stop such practices as the once common practice of paying favored customers the price of a newspaper advertisement of the manufacturer's product, and computing that price on the basis of a national advertising rate, when in fact the seller received the advantage of a local advertising rate from the paper.¹

Another, and perhaps unlooked for effect has been a number of "hold-ups", many cases having been reported of manufacturers notifying customers that they had been receiving discriminatory discounts, which were now forbidden by the Robinson-Patman Act, when in fact all the buyers had been receiving the same discount.

Brokerage Allowances. The problem of "dummy" brokerage houses under the Robinson-Patman Act has already appeared. The first case involving the legality of an order by the Commission to reach the Federal courts, under this act, was that of the Biddle case.² The Biddle Company which operated market information and purchasing services was ordered along with eight other companies to cease and desist from violating the Section Two-C, that is the brokerage section, July 17, 1937. The Commission found that those of the respondents who were sellers violated the act by

1. Business and the Rob.-Pat. Act, Kaylin pgs. 132-142.
2. F.T.C. vs. Biddle Purchasing Co., N.Y. et.al. 96 Fed. (2d) 687.

effect upon consumers to the large measure.
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manufacturer's product, and comparing that price on the
basis of a national advertising rate, when in fact the
seller received the advantage of a local advertising rate
from the paper.

Another, and perhaps unknown for effect has
been a number of "half-measures", many cases having been re-
ported of manufacturers notifying customers that they had
been receiving discriminatory discounts, which were now
forfeited by the Robinson-Patman Act, when in fact all
the buyers had been receiving the same discount.

Procedural Allegations. The matter of "dupe"

Procedural matters under the Robinson-Patman Act has already
appeared. The first case involving the liability of an
order by the Commission to return the federal courts, under
this act, was that of the White case, 5. The White Company
which operated under information and otherwise services
was ordered along with eight other companies to cease and
desist from violating the Section Two-G, that is the proba-
ble section, July 15, 1937. The Commission found that those
of the respondents who were called violated the act by

1. Business and the Robinson-Patman Act, Section Two-G, 1937-1938.
2. F.T.C. vs. White Packaging Co., N.Y. 1937, 100 F.2d 100.
(25) 257

paying brokerage fees to the Biddle Company, "with knowledge of the fact that the fees were intended to be and were being paid over by the Biddle company to its buyers; that the buyers were violating the statute by receiving and accepting brokerage fees paid by the sellers...through the Biddle company; and that the latter was violating the statute by accepting such fees and transmitting them to the buyers."

The petition of the respondents to set aside the Commission's order was denied, May 2, 1938 by the Second Circuit Court (New York). The Court stated:

"Congress may have had in mind that one of the principal evils inherent in the payment of brokerage fees by the seller to the buyer directly or through an intermediary, is the fact that this practice makes it possible for the seller to discriminate in price without seeming to do so. If a price discount is given as a brokerage payment to a controlled intermediary, it may be and often is concealed from other customers of the seller. One of the main objectives of Section Two-C was to force price discriminations out into the open where they would be subject to the scrutiny of those interested, particularly competing buyers... The order entered is responsive to and justified by the findings of the Commission and satisfies the requirements of due process."¹

The Goodyear Tire & Rubber Company case is one involving such a variety of considerations that a review of the main issues of the case would serve to throw light on several modern economic trends.^{2,3} The Goodyear Company made a contractual arrangement with Sears-Roebuck in 1926, to provide tires to Sears at cost plus six percent profit. The elements entering cost were to be the same as prevailed in the manufacture of Goodyear's own product; delivery was to be in accordance with Sear's shipping instructions (f.o.b.-

1. F.T.C. vs. Biddle Purchasing Co. N.Y. et.al. 96 Fed. (2d) 687.

2. F.T.C. vs. Goodyear Tire & Rubber Co. 92 Fed. (2d) 677; 303 U.S. 631.

3. Dun's Review, May, June, July 1936.-George.

point of manufacture); expense of local shipments direct to Sear's customers was to be defrayed by Sears; Sears agreed to make no mention of Goodyear in its sales.

A second contract tightened up the "cost" part of the arrangement; certain items were to be exempted--thus selling and advertising expenses, interest on borrowed monies, or loss above a certain proportion, due to the manufacture of "seconds". Goodyear's profits were to be raised from six to six and a half percent whenever the price of crude rubber averaged less than twenty five cents per pound, for the quarter involved.

The Commission held that in the light of prices on individual types of tires, the average sales price discrimination, remaining after deductions had been made from the dealer's (viz. Goodyear's) prices for discounts and allowances and transportation over the entire period, varied from twenty nine to forty percent, on eight sizes of tires. When "due allowances" for selling cost differentials were made the net discrimination was reduced to eleven to twenty two percent on the same tires. (The percentages were computed on the basis of net sales prices to dealers.)

During the period under discussion, Goodyear had spent some \$27,000,000 for advertising and selling expenses. The Commission's attorneys held that these costs should be prorated between the Goodyear dealers and Sears. If this were

point of manufacture; expense of local expenses direct

to Bank's statement was to be delivered by Bank; Bank

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The Commission's experts held that these costs should be

proportioned between the Goodyear dealers and Sears. If this were

accepted then Goodyear's profits from its own dealers would show a substantial increase and would greatly reduce the apparant differences in cost to Goodyear between the two channels of distribution, and hence price differentials would become all the more significant. The Commission's trial examiner held that these expenses should be prorated to Sears and the Goodyear dealers because:

1. Goodyear's manufacture of tires for Sears increased sales resistance to Goodyear's own brands, and necessitated additional advertising and selling expenses, and longer terms of discount to their own dealers;
2. by reason of public knowledge of the fact of Goodyear's manufacture of tires for Sears, the latter derived a selling advantage from Goodyear's advertising expenditures;
3. Goodyear secured the Sears business, as it had secured all its business, by reason of the prominent position it held in the tire industry, one created and maintained by its selling efforts.

The Commission (in its judicial capacity) held that these expenses should not be charged to Sears, and that this practice was not unfair insofar as the price discrimination was explained by advertising and selling expenses.

In 1932, Sears audited Goodyear's costs, and concluded that it was being charged improperly with certain items of administrative expense--thus expenses of the credit department, maintenance of experimental investigations related to products other than tires, and cost of the con-

trollers department expended in checking Goodyear's payments for dealers advertising.

In the Profit and Loss Statement, there were certain items which gave rise to dispute between the respondents and the Commission's lawyers.

The first of these was the item on Goodyear's own retail outlets, of which they had 262 in 1933. In the period under discussion 1926-1933 these stores suffered losses amounting to over \$9,000,000. Conflict arose over the question whether these losses should be charged to Goodyear's dealer business or to a venture on its own right. The Commission's lawyers held that Goodyear was forced into the retail business because of Sears competition. The company maintained that it had established these stores to maintain their business of selling and servicing corporations owning large fleets of vehicles. The company held that only fifteen percent of its sales volume was directly with private customers (the rest being fleet business), hence only in a few cases could Sears competition have affected their decision to open these stores. In the hearings conducted by the Commission a considerable volume of testimony was put in the record by manufacturers and dealers to the effect that the expansion of manufacturer-owned stores was primarily an effect of the of the new competition supplied by Sears. The Commission took this view and excluded from expenses chargeable to dealer business such expenses as were incurred in connection with Goodyear-operated stores.

Since 1924 Goodyear had sold a considerable volume on bus and taxi mileage rates, where tires are rented at a flat rate per mile. In this period (1926-1933) a business amounting to \$22,800,000 was done by Goodyear and resulted in a net loss of \$1,000,000. Here again there was the same dispute on whether this item should be included in the Goodyear dealer Profit and Loss statement.

The Commission was also concerned with the secrecy involved in the dealings; thus many details were concealed from the Commission at the time of the preliminary investigation; neither were they disclosed to stockholders and sales officials of Goodyear.

Attention was given to the status of retailers in the tire field. The number of retail tire dealers was augmented by a huge mass of chain and mass-distributor outlets from this period of 1926-1933. The Commission held that the position of the independent retailer had grown steadily worse in this period, viewing it not so much from the viewpoint of mere numbers, but in changes in the character of operations, ability to show a profit, and demoralization (of price structures) in the industry. Independent dealers had lost heavily in the total renewal business. The decline was from 89.8% in 1926 to 63.8% in 1933.

Factors in this loss were; sale of spare tires directly to automobile manufacturers; mail order houses and chains had increased their shares of the total replacement business from 8.6% to 13.2% in this period; manufacturer-

Since 1932, however, the sale of automobiles has
been on a steady decline, and the price has
fallen at a rate of 10% in this period (1932-1937).
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ture in the industry. Independent dealers had lost heavily
in the total tire market. The dealer was from \$2.50
in 1932 to \$1.50 in 1937.
Factors in this loss were: sale of more tires
directly to automobile manufacturers; and other houses and
chains had increased their share of the total tire market
business from 5.5% to 15.5% in this period; manufacturer-

owned stores had captured 8% as against a mere .5% in 1926; oil companies had moved into the field, diverting 9% through their filling station outlets, whereas in 1926 these had been a negligible factor.

The Federal Trade Commission held that the chaotic conditions prevailing in the tire field, beginning in 1928 were due in great measure to Sears tactics. Even with extremely liberal trade-in allowances (25%), free tubes and pair prices, Sears could sell tires at a gross profit as high as 60%, while independents in most cases could not meet such competition. The difference in price actually paid by Sears and Goodyear dealers was from 20-25% in the years 1926-1929, the period of most rapid growth. The entry of other mass distributors into this field, the Commission held, was forced by this disparity and the bludgeoning usage of it by Sears.

In January 1938, the United States Rubber Company entered into a "cost plus" contract with Montgomery-Ward; also U.S. Rubber and Goodrich Rubber began to sell on the same basis to the Atlas Company, a Standard Oil subsidiary. The Commission stressed the fact that Sears heavy dependence on low price was illustrated by the fact that when, in response to the pleas of various interests, it brought up its price schedule up to within 10% of the leading manufacturers first line prices, in 1933, and tried to follow the same trade-in allowance policies as the independent its volume declined sharply. In 1933 its first step to recover its volume was to restore its 25% trade-in allowance plan. In

1926-29 making vigorous use of the wide price differential it had secured a 9.6% of the replacement business, as contrasted to 2.77% in 1926.

Further the Commission held that Goodyear's bonus system to dealers was of small use to small dealers, since in 1933 only 38% of all the dealers received a bonus, and furthermore many bonuses were in trifling amounts.

The Commission also placed on Sears the principal responsibility for the growth of company-owned stores, filling station competition, and private brands, to the progressive detriment of the independent retail function. The Commission held that these new competitive elements, many operating at a loss or without proper assumption of overhead, were the desperate answers to Sears price competition, rather than a normal economic development.

In 1926 there were 104 tire and tube manufacturers selling their output, principally through independent outlets. In 1933 there were 32. Hence it was held that the field of competition was being narrowed both with regard to manufacturers, and to retailers, and that this area would continue to ever narrow while the Goodyear-Sears arrangement was in effect.

Goodyear's rebuttal pointed out that the agreement was made in good faith. The course of Sears was defended as a clear businesslike method. In 1925-1926, learning that its tire volume was only half of that of its rival, Montgomery-

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Goodyear's rebuttal pointed out that the agreement was made in good faith. The course of Sears was defended as a clear businesslike method. In 1925-1926, fearing that its tire volume was only half of that of its rival, Montgomery-

Ward, it went into this field aggressively. As a result of these efforts, it was held, both the parties benefited. Goodyear had secured a very desirable new customer, making a profit of more than \$6,000,000 from this--this business being an anchor to the windward in an era of economic depression and wildly fluctuating prices, values and profits. Also through this arrangement, Goodyear cast on Sears the risk of raw material price declines and credit losses, and was thus stabilized greatly in a depression period.

The Commission's order established two tests to which Goodyear must conform:¹

(A) Using individual tire prices as a basis, net realized prices to Sears must not be less than those to dealers, when allowances had been made for differences in costs of transportation, and selling to dealers. (According to this test, unfair discrimination ranged from 11-22% on the eight popular sizes of tires.

(B) Using aggregate sales as a basis, Goodyear may not earn a smaller profit on its Sears business than on a similar volume of its dealer business, although in computing these profits, Goodyear need not charge to Sears any selling or advertising expenses incurred in the sale of Goodyear brands, and must do so to dealers.

The Commission's order closed with the suggestion that Goodyear either lower its prices to dealers, or raise

1. Matter of Goodyear Tire & Rubber Co., F.T.C.D. 2116 (1936).

which it went into this liquidation. As a result of

these efforts, it was able to pay the claims of its

creditors and secured a very desirable new customer, making

a profit of more than \$5,000,000 from this--the business

being an example to the industry in the use of economic

production and wisely fluctuating prices, values and profits.

Also through this arrangement, Goodyear saved on Sears the

cost of new material price declines and credit losses, and

was thus enabled to profit in a liquidation period.

The Commission's order provided for the return to

which Goodyear must comply:

(A) United States retail tire prices as a basis, not realized

prices for Sears must not be less than those for dealers,

when allowances had been made for differences in costs of

transportation, and selling expenses. (According to this

test, United States retail tire prices from 1934 to 1936

averaged about 10% higher.

(B) United States average cost as a basis. Goodyear may not earn

a smaller profit on its Sears business than on a similar

volume of its dealer business, although in computing these

profits, Goodyear need not charge to Sears any selling or

advertising expenses incurred in the sale of Goodyear tires,

and must do so to dealers.

The Commission's order stated with the exception

that Goodyear might lower its prices to dealers, or raise

its prices to dealers, or raise

its prices to dealers, or raise

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its prices to dealers, or raise

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its prices to Sears.

The Goodyear Company announced the abrogation of its contract with Sears on account of the passage of the Robinson-Patman Act.¹

On appeal the Supreme Court granted to the Commission the writ of certiorari, and reversing the decision of the Circuit Court, remanded the case to the Circuit Court for determination of its merits.²

The Status of the "Small" Independent.

A problem concomitant with the question of price discrimination and resale price maintenance is that of the place of the small merchant in the distributive system. The Department of Commerce, in the Census of 1935, in which they employed ten thousand workers who visited every retail establishment in the country, gives the following figures.³

<u>(Yearly Volume)</u>	<u>Stores</u>	<u>Sales</u>	<u>(Percentages)</u>	
			<u>Stores</u>	<u>Sales</u>
Less than \$5,000	686,347	\$1,479,225	41.2	4.4
\$5,000---- 9,999	305,711	2,171,441	18.3	6.3
\$10,000 --19,999	292,713	4,094,661	17.2	12.1
\$20,000 --29,999	130,716	3,150,829	8.7	9.5
\$30,000 --49,999	120,882	4,625,272	7.4	14.2
\$50,000 --99,999	72,868	5,009,656	4.4	15.0
\$100,000 -299,999	39,267	5,838,332	2.3	17.5
\$300,000 -and Over	8,444	6,879,637	.5	20.8
Total	1,654,948	\$33,249,053	100.	100.

1. N.Y. Times, July 17, 1936, pg. 30.

2. F.T.C. vs. Goodyear Tire & Rubber Co. 92 F. (2d) 677; 303 U.S. 631, (May 16, 1938).

The significance of these figures lies in the fact that 41.2% of our retail stores which have a volume of less than \$5,000 per year, have a volume of less than \$16.75 per day, thus operating at a net profit of about thirty-five cents per day, (since a two percent profit is usually considered to be the average yield). Whatever more than this is earned must represent abnormally low operating costs, including wages, or abnormally high profits or entrepreneurial returns.

The importance of this number of stores, too small to give their operators a living wage is the effect on prices which the consumer must pay. They are not only parasitic--and the consumer has to make up the deficit which results--but the consumer must also pay for the tremendous costs in wholesaling occasioned by the small merchants. It has been estimated that the consumer pays in the aggregate at least half of our wholesaling costs for the maintenance of services to these outlets which serve only 4.4% of the total.

"The opinion used to be that the predatory big trust was looting the poor consumer; now people realize that the parasitic incompetent also constitutes a social and economic danger. Monopoly dangers of the past are negligible compared with the high continuous and futile costs of operation of retail establishments on a wasteful, incompetent small scale. Hence when we consider the Robinson-Patman Act and similar legislation, we should question the advisability of gearing down the whole mechanism to favor its least competent parts."¹

1. Ibid., pg. 57.

The significance of these figures lies in the fact that 41.2% of our retail stores which have a volume of less than \$5,000 per year, have a volume of less than \$10,000 per year. This operating at a net profit of about twenty-five cents per day, (since a two percent profit is usually considered to be the average yield). Whatever more than this is earned must represent abnormality in operating costs, including wages, or abnormally high profits or entrepreneurial returns.

The importance of this number of stores, too small to give their operators a living wage is the effect on prices which the consumer must pay. They are not only wasteful--and the consumer has to make up the deficit which results--but the consumer must also pay for the tremendous costs in wholesaling occasioned by the small quantities. It has been estimated that the operating loss in the aggregate at least half of our wholesaling costs for the maintenance of stores to these outlets which serve only 1.5% of the total.

The question then is to be that the government big what was looking for the consumer; not people realize that the present situation also constitutes a social and economic danger. Monopoly interests of the past are negligible compared with the high concentration and public costs of concentration of retail establishments on a wasteful, unproductive small scale. Hence when we consider the Robinson-Patman Act and similar legislation, we should guard against the ability of cartels from the whole tendency to favor the least competent party."

Resale Price Maintenance and "Loss-leader" Selling.

The problem of resale price maintenance arises in the case of trade marked or trade named goods which have a certain consumer acceptance. The manufacturer looks to the consumer as his goal, and directs his main efforts of salesmanship in this direction, and regards the intermediate agencies of wholesalers and retailers as mere factors in distribution of his product; hence the manufacturer likes to determine major problems of scope of advertising, size, shape and price of his product, and expects to prescribe to his outlets the price at which his product will be offered to the public. The manufacturer, after seeing to it that the profit margins to wholesalers and retailers are sufficiently attractive, must take some steps to enforce these price scales. Highly perfected schemes have been developed to ensure the success of such systems.

Co-mingled with the problem of price maintenance is that of price-cutting or the selling of "loss leaders". Chain and department stores, and mail order houses have been the chief factors in the matter of price cutting, often pushing aggressive sales campaigns at "featured", "cut" prices, doubtlessly to take advantage of the advertising value of such sales.

Price cutting generally goes on on widely advertised articles, since the price cutter tries to give the customer the idea that the store is a general low price store, for losses on these items can be compensated by the sale of non-

Research Policy Maintenance and "Loss-Leader" Selling

The problem of retail price maintenance arises in the case of trade marked or trade name goods which have a certain inherent attractiveness. The manufacturer looks to the consumer as his goal, and directs his sales efforts of salesmanship in this direction, and regards the intermediaries, agents of wholesalers and retailers as mere factors in distribution of his product; hence the manufacturer likes to determine major problems of price of advertising, time, space and price of his product, and expects to prescribe to his outlets the price at which his product will be offered to the public. The manufacturer, after seeing to it that the profit margins to wholesalers and retailers are sufficiently attractive, must take some steps to enforce these price policies. Highly protected consumers have been developed to ensure the success of such systems.

Complained with the problem of price maintenance is that of price-control on the selling of "loss leaders". Chain and department stores, and self service houses have been the chief factors in the matter of price cutting, often pushing aggressive sales campaigns as "specials", "cut" prices, doubtless to take advantage of the advertising value of such sales.

Price cutting generally goes on on widely advertised articles, when the price cut is given to give the consumer the idea that the store is a general low price store, for losses on these items can be compensated by the sale of non-

cut articles, the high price of which will not be apparent to the consumer. The tendency has grown because of the great multiplicity of items carried by wholesalers and retailers; thus if the volume of sales of a few thousand items appear to be at stake, it may be good business to sacrifice profits on certain items or to even sell at a loss. Moreover it may make sizeable contributions to overhead, by greatly increasing the total volume of business.

Distributors denounce loss leaders since customers may regard them as profiteers when they offer at standard prices, the identical article which the price cutter is offering at lower prices. Thus they may lose not only the sale of the branded article but consumer good will as well. Hence condemning chains and other price cutters, they generally seek assurance from the manufacturer that their own margin of profit will receive protection. Independent stores are often the chief outlets for manufacturers, and they are inclined to grant the desired protection. From the viewpoint of the manufacturer also cutting of prices often result in the "footballing" of prices for the product in a downward spiral to a level where profits are impossible.

Legal background. The leading case of price maintenance prior to the enactment of the Federal Trade Commission Act was the Miles case, where the courts denied an injunction to a manufacturer against a dealer who refused to abide by

contracts setting prices for the products.¹ While the case was decided on technical grounds, the courts found that the sales plan restricted "the freedom of trade on the part of dealers who own what they sell", and that agreements or combinations "having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void." The court concluded that "the complainant having sold its products at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."

Later the same article was patented, and on the package in which it was sold was the statement that the sale of the package below \$1.00 would be a violation of the license and an infringement of the patent. The manufacturer later claimed patent infringement on cut selling, but the Supreme Court held that the privileges conferred by the patent law did not include the right to fix retail prices.²

Justice Holmes made a vigorous dissent in the Miles case. He pleaded that the public interest should be the deciding factor in cases where there were no body of judicial precedent. "I cannot believe that in the long run the public will profit by this court permitting knaves to cut reasonable prices for some ulterior motive of their own, and thus impair, if not destroy, the production and sale of articles which it is assumed to be desirable that the public should be able to get."

Thus the legal status of price maintenance was

1. Dr. Miles Medical Co. vs. Park & Sons, 220 U.S. 373 (1911).
2. Bauer vs. O'Donnell 229 U.S. 1 (1913).

contracts setting prices for the products. While the case was decided on technical grounds, the court found that the sales plan restricted "the freedom of trade on the part of dealers who own what they sell", and that arrangements of combinations "having for their sole purpose the destruction of competition and the fixing of prices, are injurious to the public interest and void." The court concluded that "the complainant having sold its products at prices satisfactory to itself, the public is entitled to whatever advantage may be derived from competition in the subsequent traffic."

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Thus the legal status of price-fixing was

that the manufacturer could not safely, either on patented or non-patented merchandise, employ either notices or contracts. The Supreme Court had refused to enforce both of these instruments, and in two lower courts, the Government had enjoined their use as violations of the Sherman Act.^{1,2}

The first case of a customer bringing suit against a seller who was attempting to compel adherence to fixed retail prices was that of A. & P. vs. Cream of Wheat.³ A. & P. brought suit against the cereal company for damages, under the Clayton Act, claiming it to be acting in restraint of trade, because of refusal to sell. The Court denied the complaint, holding that it was not an unreasonable restraint of trade; moreover it held that the granting of an injunction would cause a restraint of trade to the extent of aiding the price cutter to eliminate competition by making it impossible for the retailers to handle the article at a profit. Other cases similar to this, namely simple refusal to sell were decided in the same manner.^{4,5}

In the meantime cases came to the Supreme Court involving indictments under the Sherman Law, where the manufacturers had urged dealers only to sell at fixed prices, and had refused to sell to dealers who did not comply, but

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1. U.S. vs. Keystone Watch Case Co. D.D. Pa., 218 Fed. 50 (1915).
 2. U.S. vs. Kellogg Toasted Corn Flakes Co. D.C. Mich. 222 Fed. 725 (1915).
 3. Great A. & P. Tea Co. vs. Cream of Wheat Co. D.C.N.Y. 224 Fed. 556 (1915)
 4. Welch Grape Juice Co. vs. Frey & Son Inc. 4 C.C.A. 261 Fed. 68. (1919)
 5. Frey & Son Inc. vs. Cudahy Packing Co. 256 U.S. 208 (1921)

that the manufacturer could not safely, either on patented or non-patented merchandise, employ either marks or designs. The Supreme Court had refused to enforce both of these injunctions, and in two lower courts, the Government had obtained their use as violations of the Sherman Act. The first case of a business principle suit against

a seller who was attempting to compel adherence to fixed retail prices was that of *A. S. v. Green of Wheat*, 348 U.S. 282 (1955). The Supreme Court had refused to enforce the injunction, holding that it was not an unreasonable restraint of trade; moreover it held that the granting of an injunction would cause a restraint of trade to the extent of aiding the price fixer to eliminate competition by making it impossible for the retailers to handle the article as a profit. Other cases similar to this, namely rights refusal to sell were decided in the same manner. *A. S.*

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1. *U. S. v. Kayser's Watch Case Co.*, 348 U.S. 282 (1955).
2. *U. S. v. Kayser's Watch Case Co.*, 348 U.S. 282 (1955).
3. *Green A. S. v. Green of Wheat Co.*, 348 U.S. 282 (1955).
4. *Green A. S. v. Green of Wheat Co.*, 348 U.S. 282 (1955).
5. *Green A. S. v. Green of Wheat Co.*, 348 U.S. 282 (1955).

used no contracts.^{1,2} The court refused the indictments;

"In the absence of any purpose to create or maintain a monopoly, the Act does not restrain the long recognized right of a trader or manufacturer engaged in an entirely private business, to exercise his own independent discretion as to persons with whom he will deal. And of course, he may announce in advance the circumstances under which he will refuse to sell... In Dr. Miles Medical Co. vs. Park & Sons Co. supra., the unlawful combination was effected through contracts which undertook to prevent dealers from freely exercising the right to sell."

The leading case in which the Federal Trade Commission was involved was the Beechnut Packing Co., case, where the Commission issued an order to cease from their price fixing methods which did not include contracts but had elaborate card records of dealers, and maintained a staff of investigators to look into violations of the price policies, and kept lists of "desirable" dealers and "do not sell" dealers.³ The order was set aside by the Circuit Court but was reaffirmed by the Supreme Court, in a five-four decision. The majority opinion held that "the facts show that the Beech-Nut system goes far beyond the simple refusal to sell goods to persons who will not sell at stated prices, which in the Colgate case was held to be within the legal right of the producer...The system here disclosed necessarily constitutes a scheme which restrains the natural flow of commerce, and the freedom of competition in the channels of interstate trade...From this...conduct a court may infer... that competition among retail distributors is practically suppressed, for all who would deal in the company's products are constrained to sell at the suggested prices..."

1. U.S. vs. Colgate 250 U.S. 300 (1919)

2. U.S. vs. Schrader & Son. Inc., 252 U.S. 85.

3. F.T.C. vs. Beech-Nut Packing Co. U.S. 441,459 (1922)

Nor is the inference overcome by the conclusions stated in the Commission's findings that the merchandising conduct of the company does not constitute a contract....The specific facts show that suppression of the freedom of competition by methods...which are quite as effective as agreements expressed or implied...By these methods the company although selling its products at prices satisfactory to it, is enabled to prevent competition in their subsequent disposition..."

This decision, however, pointed out that the passage of the Federal Trade Commission Act had not extended the law to the point that resale price maintenance could be declared illegal as an unfair method of competition, unless the presence of an element of illegal cooperation was proved. (The Commission had contended that it was illegal per se.)

In the General Electric case, the Court held that when the dealer is an agent of the manufacturer, the latter may control resale prices without contravening the law.¹

The "Fair Trade" Movement. Growth of the Fair Trade Law movement--forty three States had such laws in June, 1938--and passage of the Miller-Tydings Act has necessarily modified the position of the Federal Trade Commission with regard to price maintenance. Thus of the seven complaints mentioned in the Commission's annual report for 1937, two were closed because the Commission had no evidence that the defendants had engaged in such practices in the District of Columbia, or in the five states not having Fair Trade Laws.² The remaining five cases

1. U.S. vs. General Electric Co. 272 U.S. 476 (1926).

2. F.T.C. Report June, 1938.

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1. U.S. vs. General Electric Co., 372 U.S. 276 (1953).
2. F.T.C. Report June, 1938.

were continued since the systems used by the respondents involved shipping and sale of the product in the District of Columbia, (which has no Fair Trade Law).

Present Legal Status. Court trends too have changed the status of price maintenance. In *Nebbie vs. New York*, the Supreme Court upheld the right of a state board to fix minimum prices for milk. The Court held that the due process clause was not controlling. "Neither property rights nor contract rights are absolute...Equally fundamental with the private right is that of the public to regulate it in the common interest.

"...No exercise of the private right can be imagined which will not in some respect, however slight, affect the public; no exercise of the legislative prerogative to regulate the conduct of the citizen which will not to some extent abridge his liberty or affect his property. But subject only to constitutional restraint, the private rights must yield to the public need.

"...If...the industry is subject to regulation in the public interest, what constitutional principle bars the state from correcting existing maladjustments touching prices? We think there is no such principle. Price control, like any form of regulation, is unconstitutional only if arbitrary, or demonstrably irrelevant to the policy the legislature is free to adopt, and hence an unnecessary and unwarranted interference with individual liberty." (Justice Roberts)¹

A typical State Fair Trade Law is that of the State of California, which states that where prices are set on a trade marked article, by vertical contracts, it is unfair competition for any dealer to cut below the contractual price. The Supreme Court has upheld the constitutionality of such a contractual arrangement, and has

1. *Nebbie vs. New York*, 291 U.S. 502 (1934)

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held that others who have notice of it must conform, even if they are not parties to the contract.¹

In the same way the Illinois "Fair Trade Act" was upheld, the decision stating that the distributors owned the commodity, but not the brand name, and the accompanying good will; the distributors were free to sell the commodity, if they wished, without identifying labels or containers, at any price they chose. Whether price cutting in the sale of trade marked articles was injurious to the goodwill of the producer was "fairly open to difference of opinion", but if the states decided that goodwill was thus damaged, the method of protection selected, was not unconstitutional.²

Trends. The most difficult problem in enforcing the anti-trust laws is admittedly the proving that a combination exists; the Tydings-Miller Act unquestionably makes this matter of proof even more difficult. Now that a single manufacturer may lawfully control the resale prices of his product it may be more troublesome to prove that several manufacturers, each fixing retail prices, have agreed upon and are fixing one price at which similar products of any of them may be retailed. This difficulty is present not so greatly in smaller industries, where the element of competition is stronger, but in large-capital industries where the possibilities of price agreements are stronger.

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1. (California) The Pep Boys, Manny, Moe & Jack vs. Pyroil Sales Co. 57 Sup. Ct. 147 (1936)
 2. Old Dearborn Distributing Corp. vs. Seagram-Distillers Corp. 57 Sup. Ct. 139 (1936).

held that others who have notice of all such contents, even if they are not parties to the copyright.

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Standa. The most difficult question in this case is the anti-trust law in relation to the existing case a non-alienation exists; the Trade-Mark Act unquestionably exists this matter of trust even more difficult. How that a single manufacturer may lawfully control the resale price of his product it may be more reasonable to prove that several manufacturers, each fixing retail prices, have agreed upon and are fixing one price at which similar products of any of them may be retailed. This difficulty is greatest not so greatly in smaller industries, where the element of competition is stronger, but in large-scale industries where the possibilities of price agreements are stronger.

1. (California) The Fox Film Corp. v. Dole, 29 Cal. 2d 117 (1952)
 2. Old Bear Brand Distilling Corp. v. Seagram-Smollin Corp., 37 Cal. 2d 135 (1952).

Although the Miller-Tydings act and the State Fair Trade Acts apply only to trade-marked or branded products, almost any product from steel to walnuts can be trade-marked or branded. Thus to the agency arrangement of price fixing is added this method of price fixing by means of actual sales. Proponents of this type of legislation point out that such laws do not authorize governmental price fixing, and that they are not compulsory of action by manufacturers or producers.¹ The Supreme Court, in upholding the constitutionality of State Fair Trade Acts said:

"It is clear that this ... does not attempt to fix prices, nor does it delegate such power to private persons. It permits the designated private persons to contract with respect thereto. It contains no element of compulsion, but simply legalizes their acts, leaving them free to enter into the authorized contract or not as they see fit."²

The courts interpret the primary aims of these laws to be the protection of the producer's good-will, a thing which he owns. Hence price maintenance is adopted as an appropriate means of achieving that legitimate end.

In the Goodyear case, where the problems of price discrimination and price maintenance were inter-related, much of the argumentation centered about the desirability of "preserving the little man."³ The proponents arguments ran to the effect that the preservation of the small independent distributor is of paramount economic and social

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1. Hearings before a Subcommittee of the Committee on the Judiciary (Senate) ----75th Cong. first ses. March 4, 1937.
 2. Old Dearborn Distributing Corp. vs. Seagram-Distillers Corp., 57 S.C. 139.
 3. F.T.C. vs. Goodyear Tire & Rubber Co. 92 Fed. 667.

Although the Miller-Tydings act and the State Fair Trade Acts apply only to trade-marked or branded products, almost any product from which a benefit can be derived is covered by the act. Thus to the extent of the act's coverage of price fixing is based on the act's fixing by means of actual sales. Proponents of this type of legislation point out that such laws do not authorize governmental price fixing, and that they are not compulsory of action by manufacturers or producers. The Supreme Court, in upholding the constitutionality of State Fair Trade Acts said:

"It is clear that this... does not attempt to fix prices, nor does it delegate such power to private persons. It neither authorizes private persons to conspire with respect thereto, nor contains an element of compulsion, but simply regulates their acts, leaving them free to enter into the authorized contract or not as they see fit."

The court further stated the primary aim of these laws is to be the protection of the producer's good-will, a thing which is true. Hence price maintenance is adopted as an appropriate means of achieving that objective and in the majority cases, where the problem of price discrimination and price maintenance were inter-related, even of the argumentation centered about the constitutionality of "conserving the little ear." The proposed arguments ran to the effect that the preservation of the small independent distributor is of paramount importance and could

1. Hearing before a Subcommittee of the Committee on the Judiciary (Senate) - 75th Cong. 1st Sess., March 4, 1937.
2. Old Bear Brand Distillers Corp. vs. Seagram-Mullins Corp., 57 S.W. 2d 153.
3. F.T.C. vs. Goodson Wine & Liquor Co., 92 Fed. 857.

importance, and that many independents are losing ground, not through inefficiency, but because of the bludgeoning tactics of the large buyers. If the large competitor is able to exact price concessions which are greater than can be justified by differences in the cost of service, the small man is under a crushing handicap. This is further accentuated when his large rival takes a further cut at the fixed price by offering loss leaders. Relationships between large suppliers and large distributors (the element of stock transfer was present between Goodyear and Sears) were seen as powerful forces making for monopolistic control of business.

The large manufacturer can cripple competitors and obtain monopolistic margins from all his customers except the mass distributor. Small business thus must carry most of the selling and distributing expenses both for itself and its rival.

Countering arguments ran to the effect that small operators should have no special protection, but should survive only where they are economically justifiable, and can hold their markets by efficiency or by virtue of some special services.¹

Where price maintenance is effective, it was held, it introduces uniformity of prices between dealers who often have widely diverse costs, tends to impede innovation, forces

1. Hearings on Tydings-Miller Bill. Op. Cit.

importance, and that any importance is lacking ground, not through inefficiency, but because of the dissipation of the large power. If the large competitor is able to exact price concessions which are greater than can be justified by differences in the cost of service, the small man is under a crushing handicap. This is further accentuated when the large rival takes a further cut at the fixed price by offering loss leaders. Relations ship between large monopolists and large distributors (the element of stock transfer and present between themselves and Sears) were seen as powerful forces making for monopolistic control of business.

The large manufacturer can obtain concessions and obtain monopolistic control from all the channels except the mass distributor. Small business must carry most of the selling and distributing expenses both for itself and its rival.

Concluding arguments run to the effect that small operators should have an equal position, but should survive only where they are economically justifiable, and can hold their markets by efficiency or by virtue of some special service.

Where price maintenance is effective, it was said, it introduces uniformity of prices between dealers who often have widely diverse costs, tends to retard innovation, tends

a merchandising stress upon service, and remove price competition in the retail markets with respect to the goods protected. Among its effects, the one for which there is the least justification from the consumers viewpoint, is the establishment of uniform prices in all types of outlets under diverse conditions of cost, efficiency and services. A generalized distributive system on this basis would be disastrous, it was held.

Forces Supporting Legislation. In passing it should be mentioned that the passage of the Tydings-Miller Act and the spread of State Fair Trade Laws can be attributed in great measure to pressure brought upon the various legislatures by various wholesale and retail associations. Moreover the Tydings-Miller Act removed from producers, who were doubtlessly reluctant to enter into price contracts for business reasons, the legal "excuse" of fear of prosecution under the Sherman Act inhibitions.¹

One of the activities of Trade Associations which have a large proportion of the trade in their membership, with aggressive leadership and close ties among the members, has been the use of their power against certain manufacturers or dealers in trade boycotts. Thus wholesalers associations have often come into conflict with manufacturers who dealt with their arch rivals the chains or cooperative agencies. The Federal Trade Commission has dealt with some of the

1. Business and the Robinson-Patman Act. -- Gordon, Thurlow, M. pgs. 39-67.

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 N. Y. 35-37.

attempts by associations to direct by concerted action the channels of wholesale and retail distribution, and has been generally sustained in its findings by the courts.¹ Thus a decree was entered in a Circuit Court enjoining the National Association of Retail Druggists, and the National Wholesale Druggists Association, perpetually from "inducing, forcing, or compelling any manufacturer ...to enter into any contract..."¹

The methods and power of concerted action can be appreciated from excerpts from an article appearing in the Law Review of the University of California;²

"..In the January 1, 1935, issue of the Northern California Drug News there is an editorial lauding a well known national dentifrice and antiseptic manufacturer for finally issuing fair-trade contracts after months of request, including a formal petition, on the part of retailers. The company was praised particularly because it guaranteed minimum margins of 18.4 percent, 26.5 percent, and 34.2 percent (on cost price)..depending upon the quantity purchased. However, on July 13, 1935, dealers in California received letters from this firm advising them that it was necessary to withdraw from operation under the Fair Trade Act, since they were making shipments directly from Chicago and hence were involved in interstate commerce.

"Immediately a storm broke loose in California which swept into other states before it has spent itself. On July 17 the northern association passed a resolution condemning the company and urging and advising its members to "discontinue the sale of the products of any and all companies which cancel Fair Trade contracts." Similar action was taken in the southern association. The response of the trade was amazing; an almost universal boycott was raised against the firm. For a period it was impossible to obtain the products of the firm only from a few cut-rate outlets. An interesting aspect was that a large number of wholesale houses also cooperated by refusing to deliver the items of the company.

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1. Prof. Ewald T. Grether--Univ. of California, Sept. 1936.
 2. F.T.C. vs. Wholesale Grocers Association of El Paso et.al.
3 F.T.C.D. 109.
F.T.C. vs. Southern Hardware Jobbers Association et.al.
4 F.T.C.B. 428 Circuit Court of U.S.-Dist. of Indiana,
No. 10593.
F.T.C. vs. The Atlanta Wholesale Grocers et.al. 4 F.T.C.D.
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attempts by associations to direct by concerted action the channels of wholesale and retail distribution, and has been generally contained in the findings of the courts. Thus a decree was entered in a District Court enjoining the National Association of Retail Druggists, and the National Wholesale Druggists Association, respectively from "hindering, torturing, or compelling any manufacturer... to enter into any contract..."

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"In the January 1, 1937, issue of the Northern California Drug News there is an editorial leading a well known national distributor and anti-trust practitioner for finally issuing fair-trade contracts after months of requests including a formal petition, on the part of retailers. The company was asked particularly because it guaranteed minimum margins of 15-20 percent, 20-25 percent, and 25-30 percent (on cost prices), depending upon the quantity purchased. However, on July 1, 1937, dealers in California received letters from this firm advising them that it was necessary to withdraw from distribution under the fair-trade act, since they were making substantial profits from Chicago and hence were involved in interstate commerce.

"Immediately a store across town in California which twice in other states before it has acted itself. On July 17 the national association issued a resolution condemning the company and urging and advising its members to 'discontinue the sale of the products of any and all companies which cancel this trade contract.' Similar action was taken in the southern association. The members of the trade was essential; an almost universal boycott was raised against the firm. For a period it was impossible to obtain the products of the firm only from a few out-lets outside. An interesting aspect was that a large number of wholesale houses also associated by refusing to deliver the goods of the company.

1. Brock, David W. *Wholesale-Druggist of California*, 1936.
2. F.T.C. vs. Wholesale Druggists Association of St. Louis et al.
3. F.T.C.D. 102.
4. F.T.C. vs. Southern Wholesale Druggists Association et al.
5. F.T.C.D. 103 District Court of U.S.-Dist. of Indiana.
6. No. 10397.
7. F.T.C. vs. The American Wholesale Druggists et al. 4 F.T.C.D. 466 (1932).

"It appears that the company had a startling decline of sales in California. Worse still, the antagonism spread into other states and affected sales and attitudes nationally. The outcome was that the company capitulated completely, again issuing contracts in California, and likewise, so it is stated, giving a check of \$25,000 to the National Association of Retail Druggists to be used in its fight for price maintenance legislation."

Tieing Contracts

In the case of Henry vs. A.B. Dick Co., a majority of the Supreme Court held that the manufacturer of a patented article could "license" the purchaser to use it upon the condition that he use with it only supplies and accessories, non-patented, made by the same manufacturer.¹ This case was one of the factors leading to Section Three of the Clayton Act.

The first case of this sort following the passage of the Clayton Act resulted in an overruling of the Dick case.² This decision held to be invalid a clause which specified in the sale of a patented machine that only the unpatented film of the vendor could be used. The next year, however, the Court held that the tying contracts of the United Shoe Machinery Corporation, requiring lessees of patented machinery to use in connection with them only unpatented machines of the lessor, did not constitute violation under the Sherman Law.³ The Clayton Act was not at issue since the alleged offenses were committed prior to the enact-

1. Henry vs. A. B. Dick Co., 224 U.S. 1 (1912).

2. Motion Pictures Patents Co. vs. Universal Film Manufacturing Co. et.al. 243 U.S. 502 (1917).

3. U. S. vs. Winslow 227, U.S. 202 (1918).

"It appears that the company had a working office or sales in California. There will, the organization secured from other states and attempted to distribute. The outcome was that the company was unable to do so, and it is stated, giving a check of \$25,000 to the National Association of Retail Druggists to be used in its fight for price maintenance legislation."

Price Controls

In the case of *Henry v. A. B. Dick Co.*, a majority of the Supreme Court held that the manufacturer of a patented article could "license" the purchaser to use it upon the condition that he use it only as supplied and accessories, non-patented, made by the same manufacturer. This case was one of the factors leading to Section 106 of the Copyright Act.

The first case of this sort following the passage of the Clayton Act resulted in an overruling of the Dick case.¹ This decision held to be invalid a license which specified in the sale of a patented machine that only the patented life of the machine could be used. The next year, however, the Court held that the tying of the life of the United States Machinery Corporation, requiring licensees of patented machinery to use in connection with their own patented machines of the licensor, did not constitute violation under the Sherman law.² The Clayton Act was not at issue since the alleged offense was committed prior to the enactment.

1. *Henry v. A. B. Dick Co.*, 259 U.S. 1 (1922).
 2. *United States v. Grain Processing Co.*, 306 U.S. 196 (1937).
 3. *V. v. Grain Processing Co.*, 306 U.S. 196 (1937).

ment of the law. The changes made by the Clayton Act were recognized by the Court in the second United Shoe case, where the tying clauses were held to be illegal.¹ Exploitation of a patent right by extending the application of the grant to other commodities more or less closely allied with the subject of the patent has been subjected to increasing restriction.

Patents.

However, in the field of patent law, monopolistic tendencies have for a long time overshadowed the original purpose of patent protection which was the encouragement of improvement of the means of production. The owners of some patents have, by the exclusive exploitation of their rights, secured legal protection for the establishment of manufacturing units so large that they were impregnable by the time the patent expired, thus the United Shoe Machinery Company, the Aluminum Corporation, the Singer Sewing Machine Company and the American Can Company.²

The patent law also serves to prolong the protection of the monopolist, since patents upon improvements can not be exploited without license from the holder of the basic patent, hence those who patent improvements can generally sell the improvements to the holder of the basic patent. Thus it is generally known that the United Shoe Machinery Company has

1. U.Shoe Mach. Corp. et.al. vs. U.S. 258 U.S. 451. (1922).

2. The Decline of Competition, Arthur R. Burns, pgs. 11-17.

ment of the law. The changes made by the Clayton Act were recognized by the Court in the United Shoe case, where the tying clauses were held to be illegal. Violation of a patent right by extending the application of the grant to other commodities more or less closely allied with the subject of the patent has been subjected to increasing restriction.

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1. U. S. Shoe Mach. Corp. et al. vs. U. S. (1922).
2. The Decline of Legislation, Arthur R. Brown, pp. 11-17.

dominated its field through this method, although the basic patents have long since expired.

At the Temporary National Economic Committee hearings one method discussed at length was the issuance of "restrictive patent licenses".¹ These are licenses which require the licensee to abide by certain conditions, to limit the kinds and amounts of goods he will produce on his machine, to turn over to the licensing corporation the patent rights on any improvement he might make on the device.

Testimony developed the facts that licenses containing such restrictions are issued by the Hartford-Empire Company of Connecticut. This company owns 717 glass-making patents which it licenses 31 manufacturers to use. These manufacturers produced last year about 67 percent of the glass containers produced in the country. About 29 percent were produced on machines covered in similar manner by patents owned by the Owens-Illinois Glass Company. Less than 3 percent were produced by "independents."

A man wishing to go into the glass-making business would have to get licenses from one of these two companies (according to the testimony of F.G. Smith, president of Hartford-Empire); Owens-Illinois have granted few such licenses in recent years, and according to witnesses it was difficult to obtain even a restrictive license. Mr. Smith testified that his company took basic conditions into consideration before issuing licenses. Thus in relation to the production of milk bottles, no such license would be granted, because there was a serious overproduction in that field.

Another factor in the field of patents is the tendency of patentees to "put their patents to sleep." In 1896 it was held for the first time that the suppression

1. U.S. News Dec. 19, 1938.

dominated the field through this method, although the basic patents have long since expired.

At the Temporary National Economic Committee hearing

large one method discussed at length was the issuance of "restrictive patent licenses". These are licenses which require the licensee to abide by certain conditions, to limit the kinds and amounts of goods he will produce on his machine, to turn over to the licensing corporation the patent rights on any improvement he might make on the machine.

Also,

Testimony developed the fact that license non-terminating such restrictions are used by the Hartford-Imperial Company of Connecticut. This company owns 117 glass-making patents which it licenses to manufacturers for that. These manufacturers produce and turn about 67 percent of the glass containers produced in the country. About 33 percent were produced on machines covered by certain patents owned by the Hartford-Imperial Glass Company. These patents were introduced by "licensees".

A man witness to go into the glass-making business would have to get licenses from one of these two companies (according to the testimony of J. B. Smith, president of Hartford-Imperial; Owens-Illinois have granted licenses to 11-12 cases in recent years, and according to witnesses it was difficult to obtain even a restrictive license. Mr. Smith testified that his company had been contacted for consideration before issuing licenses. This is in relation to the production of milk bottles, no other license would be granted, because there was a national overproduction in that field.

Another factor in the field of patents is the

tenacity of patents as "your rights in sleep".

In 1936 it was held for the first time that the corporation

of a patent was within the rights of the patentee, and the principle was upheld by the Supreme Court in 1908 and 1916.¹ In this manner a law intended to encourage the improvement of the means of production is perverted so as to permit the obstruction of the utilization of new knowledge in order to protect those who have committed themselves to older methods. The difficulty is due in part to the fact that producers must commit themselves for long periods of time.

Another factor is that the high cost of patent litigation gives a very powerful weapon to the financially powerful companies. Small firms may be prevented from exploiting patents which they have obtained, but the validity of which they cannot have confirmed without undergoing prohibitive expense. Threatened litigation by such companies as the National Cash Register, Eastman Kodak, United Shoe Machinery and others have been enabling factors in their growth.

Assistant Attorney-General Thurman Arnold brought up the possibility of more flexible patent laws, which would leave more to the courts decisions about licensing policy where the public interest is substantially affected. He favored a sort of "rule of reason" rather than the granting of an unrestricted monopoly on a patent for a 17 year period.²

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1. Hoe vs. Knap, 27 Fed. 204 (1896).
Continental Paper Bag Co. vs. Eastern Bag Co., 210 U.S. 405 (1908).
Motion Picture Patents Co. vs. Universal Film Co. et.al., 243 U.S. 502 (1917).
 2. U.S. News, December 1938.

of a patent was within the rights of the patentee, and the principle was upheld by the Supreme Court in 1908 and 1916. In this manner a law intended to encourage the improvement of the means of production is converted so as to permit the obstruction of the utilization of new knowledge in order to protect those who have committed themselves to other methods. The difficulty is due in part to the fact that producers must compete themselves for long periods of time.

Another factor is that the high cost of patent litigation gives a very powerful weapon to the financially powerful companies. Small firms are discouraged from exercising defense which they have obtained, but the validity of which they cannot have certified without undergoing prohibitive expense. Theoretical litigation by such companies as the National Cash Register, Eastman Kodak, United Shoe Machinery and others have been crippling factors in their growth.

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1. Hoe vs. East, 27 Fed. 2nd (1926).
 2. Continental Paper Bag Co. vs. Eastern Bag Co., 110 U.S. 407 (1905).
 3. Motion Picture Patents Co. vs. Universal Film Co., 243 U.S. 352 (1917).
 4. U.S. News, December 1926.

Exclusive Dealing Contracts.

Exclusive dealing contracts from the manufacturers point of view are the means of securing the undivided loyalty of retail distributors. It is most in evidence among manufacturers of nationally advertised brands who are inclined to regard wholesale and retail outlets as merely merchandising agencies to get the goods to the ultimate consumer. However in small towns, having only one or two outlets, exclusive dealings contracts may result in the tying up of substantial parts of the trade to competitors, by manufacturers of widely advertised products. In the Continental Wall Paper case in which there was a combination of 95 percent of all the wall paper manufacturers in this country, a concerted policy of entering into exclusive contracts was found by the Supreme Court to be monopolistic in tendency, and the contracts were declared to be unenforceable.¹

There are some miscellaneous cases; enticing employees of a competitor; charges of tampering with the samples or advertising of competitors; charges of bribing employees of customers to adulterate and spoil lacquers and varnishes of competitors. One interesting case is the one concerning the Chamber of Commerce of Missoula, Montana, sharing the hostility of most of its members towards the large mail order houses of the big cities, arranged with the

1. Continental Wall Paper Co. vs. Voight & Sons Co.,
212 U.S. 227 (1909).

Exclusive Selling Contracts.

Exclusive selling contracts from the manufacturer's point of view are the means of securing the undivided loyalty of retail distributors. It is good evidence among manufacturers of undivided loyalty. Distributors who are inclined to peddle wholesale and retail outside as merely supplementary agencies to get the goods to the distant consumer. However in small towns, having only one or two outlets, exclusive selling contracts may result in the tying up of substantial parts of the trade in competition, by manufacturers of widely advertised products. In the Continental Wall Paper case in which there was a combination of the sort of all the wall paper manufacturers in the country, a concerted policy of entering into exclusive contracts was found by the Supreme Court to be monopolistic in tendency, and the contracts were declared to be unreasonable.

There are some miscellaneous cases; among them those of a competitor; charges of conspiracy with the supplier of advertising of competitors; charges of bribery of customers to advertise and sell products and violations of competitors. One interesting case is the one concerning the Standard Oil Company of Indiana, wherein the possibility of one of its members having the large retail order houses of the city district, arranged with the

local moving picture house to designate certain days as "mail order catalogue day", on which day any child presenting a mail order catalogue at the box office, was admitted free. Several hundred of these catalogues were thus turned in and destroyed. The Federal Trade Commission ordered this practice to be discontinued.

The Federal Trade Commission has long been a foe of the "basing point" system.¹ This is the practice of quoting prices on a common center, or basing point, whether for the output of scattered plants of one concern, or for the products of several independent producers located at different points. The delivered price at any other point is computed by adding to the base price at each basing point, the freight charge from that point to the point of delivery, and adopting the smallest of the totals. The product may actually be shipped from a plant near the buyer, but the price is computed on the basing point.

The question of price discrimination brings this system into question since the claim is that sellers after making allowances for the cost of transportation among their various customers, exacted higher prices from customers having little or no transportation expense, and accepted lower prices from those having heavy transportation expenses. This discrimination is prohibited in both Section Two of the Clayton Act, and in the Robinson-Patman Act. (However the

1. Burns, Decline of Competition, Pgs. 282-371.

local moving picture houses to distribute certain days as
"early order catalogue day", on which day any order placed
in a mail order catalogue at the box office, but not
before, having passed of those orders with the
in and destroyed. The Federal Trade Commission ordered this
practice to be discontinued.

The Federal Trade Commission has long been a foe
of the "leading point" system. This is the practice of
quoting prices on a common basis, as leading point, whether
for the output of scattered plants of the industry, or for
the thousands of several independent producers located at
different points. The delivered price of any other point
is computed by adding to the base price at each leading point,
the freight charge from that point to the point of delivery,
and applying the analysis of the total. The product may
actually be shipped from a plant near the buyer, but the
price is computed on the leading point.

The question of price discrimination during this
system into question since the time is that buyers after
making allowance for the cost of transportation among their
various customers, wanted higher prices from customers
having little or no transportation expense, and accepted
lower prices from those having heavy transportation expenses.
This discrimination is prohibited in both Section 2 of the
Clayton Act, and in the Robinson-Patman Act. However, the

provision in the Robinson-Patman Act condoning the meeting of a competitors price is probably sufficient to justify freight destination prices, under the Act).

Under the National Recovery Act, basing point systems were used in the cement and lumber industries, although they were not specifically authorized in the codes.¹ When the code for fair competition for the iron and steel industry was drawn up, explicit provision was made for the legal enforcement of the practice. The code provided that all prices, with the exception of a few minor classes of the products, should be delivered prices and set out the basing points for each product.

The Federal Trade Commission pursuing its traditional policy of opposition to the system in its report in 1935, said of the territorial discrimination involved in the system, "it is in essence the monopolization by the sellers to the exclusion of the buyers of the natural advantages inherent in the natural resources of that territory."²

In its report to the Temporary National Economic Committee, March 7, 1939, The Federal Trade Commission said:

"When the system (the basing point system) is working smoothly, it appears that quotations on steel of a given quantity and quality are identical at any point of delivery...Mills located at points other than the basing points use the standard formula as if they were located there. Hence to the customer there is no difference between the quality and delivered price offered by all bidders.

1. Burns, pgs. 307, 325, 326. Op. Cit.

2. F.T.C., Practices of the Steel Industry under the Code, 1934.

provided at the National Bureau for conducting the business
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Under the National Bureau Act, consociation
systems were used in the present and former industries, al-
though they were not specifically authorized in the Act.
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Committee, March 7, 1935, the Federal Trade Commission said:
"When the system (the basic price system) is working smoothly,
it appears that questions on level of a given commodity and
quality are identical at any point of delivery... This fact
at points other than the basic point uses the standard
formula as if they were identical units. Hence as the commodity
there is no difference between the quality and delivered
price offered by all buyers."

"On the surface the producers approach the customer with a united front. Competition in such crude matters as price and quality has been put aside, and all that seems to remain is a gentlemanly emulation in the art of making friends and influencing people."

Abandoning its satirical vein the Commission's report said:

"Secret discounts in quality or quantity may exist in the case of strong and influential private bodies,--but small and medium sized private buyers and public bodies must pay the formula price."

After pointing out economic wastes in cross hauling, the report continued "...the price flurry of June 1938 reduced base prices: The industry was forced to operate at better than 50% of capacity to make a profit. This change was regarded by the industry as deplorable, although it led to large increases in production and consequently in employment. 'The situation was competitive,' Mr. Grace said, and he hoped that 'it had been cured'. (New York Times, Oct., 28, 1939)"¹

The report then claimed that the system permitted "raiding", since large companies by charging profitable prices in nearby territories, can accept lower net returns in particular localities, and a powerful company can in this fashion, "raid" its smaller competitor. Moreover local price cutting of the basing system, brings the threat of price raiding. It was recalled that the Commission in the Pittsburg Plus case found that the American Bridge Company could underbid its rivals, because they were able to buy materials from fellow subsidiaries of United States Steel at low prices. Since then other large steel producers have acquired fabricating companies, and thus have opportunities

1. New York Times, March 8, 1939.

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Abandoning the national view the Commission's

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sumption in employment. The situation was competitive,
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(New York Times, Oct. 22, 1933)

The report then claimed that the system described

"relating", since large companies by changing their
prices in nearly limitless, can reduce lower and return
in particular industries, and a powerful company can in
this fashion, "raise" its smaller competitor. Moreover, local
price cutting of the leading system, before the threat of
price raising. It was pointed out that the Commission in the
Pittsburgh Price case found that the American Wire Company
could outbid its rivals, because they were able to pay
materials from fellow subsidiaries of United States Steel
at low prices. Since then other large steel companies have
acquired fabricating companies, and they have operated at

for similar advantages over independent fabricators.

"The ability to decide on a price and hold to it regardless of demand, which is the essence of monopoly, is a prime factor in the establishing the vicious circle of high prices, restricted production, and reduced employment so widely condemned as 'scarcity economics.'"

"If free competition is not restored, the alternative will be the public control of the details of business policy, including prices, wages, and production schedules."

IX. STATUS OF ANTI-TRUST POLICY

Concentration in American Industry

The question may be asked, how has our anti-trust policy functioned with regard to the larger issue of preservation of competitive conditions in our industrial system? The Department of Justice readily acknowledges its failure on this larger issue.¹

"In 1932, according to statistics of the Bureau of Internal Revenue 53 percent of all corporate-owned assets in this country were held by 618 corporations, constituting 0.02 of 1 percent of the number of corporations reporting (and submitting balance sheets). 5 percent of the corporations owned 85 percent of all corporate owned wealth in 1932. More than 50 percent of all net income enjoyed by corporations in 1932, went to 232 corporations, while of the country's manufacturing corporations 1.2 percent accounted for 63 percent of aggregate net profits. In 1934 the only group of corporations to earn an aggregate net profit, was the group whose assets exceeded \$50,000,000.

"Further problems of concentration lie in the ownership of the corporations. In 1929, a banner year for stock ownership, the 3.2 percent of the population who filed income tax returns, accounted for the receipt of more than 83 percent of all dividends paid to individuals. 78 Percent of these dividends reported were received by 0.3 of 1 percent of our population.

"Moreover holding companies and interlocking directorates serve further to centralize control."

The National Industrial Conference Board Bulletin (1930) edited by Berle and Means showed:

"There are over 300,000 non-financial corporations in the United States in 1929. 200 of these, or less than 7/100 of 1 percent control nearly half the wealth (49.2 percent).

1. Report of Assistant Attorney General Robert H. Jackson, Anti-trust Division, Report of the Attorney General of the United States, year ending June 30, 1939, pgs. 35-63.

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"In 1935, according to statistics of the Bureau of Internal Revenue, 75 percent of all corporate-owned assets in this country were held by the corporations themselves, 0.02 of 1 percent of the number of corporations reporting (and submitting balance sheets). 5 percent of the corporations owned 85 percent of all corporate-owned wealth in 1935. More than 50 percent of all net income enjoyed by corporations in 1935 went to 2.5 corporations, while of the country's manufacturing corporations 1.5 percent accounted for 65 percent of a gross net profit. In 1935 the only group of corporations to turn an average net profit was the group whose assets exceeded \$25,000,000."

"Further evidence of concentration lies in the ownership of the corporations. In 1935, a twenty-year record showed that the 7.5 percent of the population who filed income tax returns, accounted for the receipt of more than 85 percent of all dividends paid to individuals. 75 percent of these dividends reported were received by 0.5 of 1 percent of our population."

"Moreover, holding companies and interlocking directorates serve further to concentrate control."

The National Industrial Conference Board Bulletin

(1930) edited by Burt and Means showed:

"There are over 500,000 non-financial corporations in the United States in 1934. 500 or more, or less than 1/100 of 1 percent control nearly half the wealth (40.5 percent)."

1. Report of Assistant Attorney General Robert H. Jackson, Anti-trust Division, Report of the Attorney General of the United States, year ending June 30, 1939, page 4-5.

"Moreover when the growth of wealth of the 200 largest corporations (non-financial) is compared with that of all other (non-financial) corporations, they show the growth to be proportionally far more rapid. The 200 largest corporations (from Federal Trade Commission figures) have increased from 1909-1929 over 50 percent faster than all other corporations."¹

Between 1922-1928, estimates of the National Industrial Conference Board show an increase in national wealth of 12.5 percent, as compared with a growth in assets of the largest 200 corporations of 45.6 percent.

"If the wealth of the 200 largest corporations, and that of all other corporations should continue at the same rate for the next twenty years, at its annual average rate for the past twenty years (1909-1929), 70 percent of all corporate activity would be carried on by 200 corporations by 1950."¹

Willard Thorp, in his testimony before the Temporary National Economic Committee presented the following figures showing various percentages of concentration in various trades.²

<u>Industry</u>	<u>No. of Companies</u>	<u>Percentage (of concentration)</u>
Aluminum	1	100
Automobile	3	86
Beef Products	2	47
Bread & Bakery Products	3	20
Cans	3	90
Cement	5	40
Cigarettes	3	80
Bituminous Coal	4	10
Copper	4	78
Corn Binders	4	100
Corn Planters	6	91
Flour	3	29
Plate Glass	2	95
Safety Glass	2	80
Iron Ore	4	64
Lead	4	60

1. Berle A.A., and Means G.C., "The Corporation and Private Property", (1932)

2. New York Times, February 3, 1939.

"However, when the world of wealth of the 1900 largest corporations (non-financial) is compared with that of all other (non-financial) corporations, they may be grouped to be proportionally the same ratio. The 500 largest corporations (from Federal Trade Commission figures) have increased from 1909-1929 over 50 percent faster than all other corporations."

Between 1929-1935, estimated by the National

Industrial Conference Board show an increase in corporate wealth of 18.5 percent, as compared with a growth in assets of the largest 500 corporations of 55.5 percent.

"If the wealth of the 500 largest corporations, and that of all other corporations should continue at the same rate for the next twenty years, at the present average rate for the past twenty years (1909-1929), 55 percent of all corporate assets would be owned by the 500 corporations by 1950."

William T. Ford, in his testimony before the

Temporary National Economic Committee, the following figures showing various percentages of concentration

in various trades:

Industry	No. of Companies	Percentage (of production)
Aluminum	1	100
Automobile	1	95
Beer Producers	1	87
Bread & Bakery Producers	1	75
Cane	1	90
Cement	1	90
Cigarettes	1	90
Electricity (Coal)	1	95
Copper	1	75
Corn Producers	1	100
Corn Producers	1	95
Flour	1	95
Glass Glass	1	95
Safety Glass	1	95
Iron Ore	1	95
Lead	1	95

1. "The A.A. and W.B. O.C.," "The Corporation and Private Property," (1932)
2. New York Times, February 7, 1935.

<u>Industry</u>	<u>No. of Companies</u>	<u>Percentage (of Concentration)</u>
Oil Wells	4	20
Steel	3	60.5
Whiskey	4	58
Womens Clothes	4	2
Wood Pulp	4	35
Zinc	4	46

In the Twentieth Century Fund Corporation Survey it is pointed out that large corporations have come into being by various ways; as a result of growth nourished by earnings "plowed back" into the enterprise; through the sale of securities to the public to finance expansion; and as a result of mergers or combinations. The survey showed that from the period 1890-1904 there were 237 consolidations involving an aggregate capitalization of \$5,963,879,667. From 1904 the combination movement practically stopped until after the War. (Explanations for this suspension include the effects of Roosevelt's and Taft's "trust-busting" activities; the stock market crash of 1903 and the business depression of 1907; and finally the unprofitableness of a large number of corporations formed before 1905). During the ten years following the War (1919-1928), "there were 1,268 combinations in manufacturing and mining, of which one-third took place during the boom years, 1927 and 1928. The movement seems to be particularly active in the iron and steel industry, although more than 100 combinations occurred also in each of the oil, nonferrous metals, textiles and food stuffs industries. The 1,268 combinations involved the union of 4,135 separate concerns and the disappearance of 5,991."¹

1. "Big Business--Its Growth and Its Place", Twentieth Century Fund Inc. 1937. pgs. 21-33.

Expenditures (of Government)	No. of Companies	Industry
1940	4	Oil Wells
1941	4	Steel
1942	4	Railways
1943	4	Woolen Goods
1944	4	Woolen Goods
1945	4	Lumber

In the twentieth century, the Corporation Survey
 it is pointed out that large corporations have come into
 being by various ways: as a result of growth brought by
 mergers "absorbed" and the "trusts"; through the
 sale of securities to the public in finance companies;
 and as a result of mergers of combinations. The survey
 showed that from the period 1890-1900 there were 257 com-
 binations involving an aggregate capitalization of
 \$5,000,000,000. From 1900 to 1910 the combinations were
 locally stopped until after the war. (Explanations for
 this suspension include the efforts of Roosevelt's and
 Taft's "trust-busting" activities; the war; and the
 of 1907 and the business depression of 1907, and finally
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 war (1914-1923), "there were 1,100 combinations in man-
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 the boom years, 1917 and 1918. The movement seems to be
 particularly active in the iron and steel industry, al-
 though more than 100 combinations occurred in other
 of the oil, cotton, rubber, and food and
 industries. The 1,100 combinations involved the union of
 4,135 separate concerns and the concentration of \$1,100,000,000

1. "Big Business--Its Growth and Its Place", New York, 1927.
 Century Book Co. 1927. pp. 23-24.

Factors in Concentration

Willard Thorpe in his testimony before the Temporary National Economic Committee, pointing out that 2/10 of 1 per cent hold 52 percent of corporate assets, suggested that the Anti-Trust laws are in part responsible for the development of large enterprises.¹ Since the law prevents collective action with regard to prices or markets or allocation of production, the only alternative left for industry was the merger tendency.

Judicial logic has played a large part in the merger movement. Narrow legal definitions have made it possible to argue that merging firms did not previously compete at all, or at least competed only on an unsubstantial scale. Thus mergers between bottle manufacturer companies--making bottles for different uses;² shoe machine companies--one of which sold in large towns, the other in small towns;³ coal mining companies selling through different wholesalers have been brought within the law.⁴ Furthermore if these devices be resorted to and used to consolidate the corporations into one, before the Federal Trade Commission takes action, the Commission is powerless to attack the merger.

The cases which erected standards are the following. In a case against the Aluminum Company of America,

1. N. Y. Times, February 3, 1939.

2. F.T.C. vs. Thatcher Manufacturing Company 5 Fed. (2d) 615-(1925) 272 U.S. 554 (1926)

3. F.T.C. vs. International Shoe Co. 280 U.S. 291 (1930)

4. F.T.C. vs. Temple Anthracite Co., 51 Fed. (2d) 656. (1931).

Theory in Construction

William Thorne in his testimony before the Temporary National Economic Committee, pointing out that 2/3 of 1 per cent holds 92 percent of corporate assets, suggested that the Anti-Trust laws are in some respects like the development of large enterprises. Since the law prevents collective action with regard to control or ownership allocation in production, the only alternative left for industry was the merger tendency.

Unlimited liability has played a large role in the merger movement. Narrow legal definitions have made it possible to argue that buying firms did not previously compete at all, or at least competed only as an unincorporated sole. This merges between better manufacturing companies - selling goods for different uses; those machine companies - say for which sold in large towns, the other in small towns; coal mining companies selling through different wholesalers have been brought within the law. Furthermore all these devices are resorted to and used to consolidate the corporations into one, before the Federal Trade Commission takes action, the Commission is powerless to effect the merger.

The cases which are cited are the following. In a case against the Aluminum Company of America,

1. E. I. du Pont, February 2, 1935.
2. E. I. du Pont vs. The Aluminum Company of America (24)
3. E. I. du Pont vs. The Aluminum Company of America (24)
4. E. I. du Pont vs. The Aluminum Company of America (24)
5. E. I. du Pont vs. The Aluminum Company of America (24)

the Circuit Court in 1922 upheld the Federal Trade Commission's order that the company divest itself of stock acquired in violation of the Clayton Act (Sec. 7), and petition for review was denied by the Supreme Court.¹ The practical result of the decision was destroyed, however, by the Circuit Court, in 1924 in denying the request of the Commission to modify the decree so as to prevent the Aluminum Company from bidding in at the sheriffs sale, the physical property of the acquired corporation in satisfaction of a debt which the Commission unsuccessfully contended was fictitious and fraudulent.

The Supreme Court held in five--four decisions that Section Seven of the statute (Clayton Act) referred to the acquisition of stock, and not to the acquisition of property even if obtained as a result of an illegal acquisition of stock.^{2,3}

Moreover the Department of Justice, in 1926, adopted the policy of inquiring into mergers at their inception.

"Their (mergers) financial structure, their purpose, and their economic background are examined before they enter into the field of business activity and the question of whether they would be violative of the law is considered before a violation has been committed. This method is at once fair to business men who desire to avoid conflict with the law and who are entitled to know the attitude of the Government towards their effort. It is effective also in preserving the public interest by ascertaining the facts and assuring that illegal combinations shall be dealt with at once."⁴

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1. F.T.C. vs. Aluminum Co. of America 284 Fed. 408; 261 U.S. 616 (1922) 299 Fed. 361. (1924).
 2. F.T.C. vs. Thatcher Manufacturing Co., 272 U.S. 554, (1926).
 3. F.T.C. vs. Swift & Company, 272 U.S. 554 (1926).
 4. American Bar Association Journal, p. 1-30.

The Circuit Court in 1924 upheld the Federal Trade Commission's order that the company divest itself of stock acquired in violation of the Clayton Act (39 Stat. 209). The decision for review was denied by the Supreme Court. The practical result of the decision was destroyed, however, by the Circuit Court in 1924 in denying the request of the Commission to nullify the decree as to previous sales. Aluminum Company from 1924 to the present has been the physical property of the registered corporation in violation of a Statute which the Government has successfully prosecuted the violation and fraudulently.

The Supreme Court held in 1924 that the Commission's order that Section Seven of the Statute (Clayton Act) violated the acquisition of stock, and not the registration of property even if obtained as a result of an illegal acquisition of stock.

Moreover the Department of Justice, in 1924, adopted the policy of punishing persons who are in violation of the Statute.

"Their (persons) financial structure, their power, and their economic power, and the extent to which they enter into the field of business activity and the question of whether they would be violative of the law is considered before a violation has been committed. This method is not fair to the public and it is not fair to the public with the law and the public is entitled to know the attitude of the Government towards such activity. It is effective also in preserving the public interest by securing the facts and revealing the illegal conditions which shall be dealt with at once."

1. F.T.C. vs. Aluminum Co. of America, 251 Fed. 1001 (1925).
2. F.T.C. vs. Aluminum Co. of America, 251 Fed. 1001 (1925).
3. F.T.C. vs. Aluminum Co. of America, 251 Fed. 1001 (1925).
4. F.T.C. vs. Aluminum Co. of America, 251 Fed. 1001 (1925).
5. F.T.C. vs. Aluminum Co. of America, 251 Fed. 1001 (1925).
6. American Bar Association Journal, 1-33.

The Department did not give positive approval to mergers, but reserved the right of further observation and investigation, and would state that no cause was found for disapproval in the facts as given, or the purpose as stated.

Reports of the Department of Justice

The Attorney General's report for 1937 lays blame for the failure of the Anti-trust Laws to preserve competition on judicial interpretation of the statutes:¹

"Such a standard (viz. "reasonableness" and corporate "intent"), is vague and does not permit consideration of the real factors involved. It does not face the issue whether a combination is in fact one which will tend to produce economies of size, or whether it will in actual operation tend to give opportunity for monopoly profits. The important factor is taken to be 'intent' or 'state of mind' of a fictitious individual, the corporation, rather than results....(This) actually describes an attitude commonly taken by courts, emphasizing moral culpability, and subordinating practical effects of business activities which tend toward monopoly or restraint of trade...

"In other words, actual results are ignored in an effort to determine whether a fictitious personality is acting in an evil state of mind. The anti-trust laws have become theological tracts on corporate morality.

"...Thus ~~the~~ Supreme Court did not consider the fact that steel rails had been at a stable price for many years, sufficient to justify prosecution. (U.S. vs. U.S. Steel Corp., 251 U.S. 417, 451) Price leadership which actually fixed price control, was held by the Court, (it) 'does not establish any suppression of competition, or any sinister domination' (U.S. vs. International Harvester 274 U.S. 693)."

"An impossible burden of proof is thrown upon the Department in most cases...Great quantities of evidence must be sought in the pursuit of the will of the 'wisp,' 'intent.'"

The report of the Department of Justice, however

1. Attorney-General's Report, year ending June, 1937.

The Department did not give positive approval to merger, but received the right of further observation and investigation, and would state that no cause was found for disapproval in the facts as given. On the purpose as stated.

Report of the Department of Justice

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"In other words, actual results are ignored in an effort to determine whether a business combination is acting in an anti-trust of itself. The anti-trust laws have become theoretical exercises in corporate strategy."

"...The Supreme Court has not understood the fact that steel trusts had been at a stable price for many years, sufficient to justify prohibition. (U.S. vs. S.E. Steel Corp., 298 U.S. 191, 1935) Price-fixing trusts which are rarely taxed or controlled, was held by the Court, (U.S. vs. American Cyanamid Co., 262 U.S. 421, 1923) not to be a restraint of trade, or an illegal combination. (U.S. vs. International Harvester Co., 224 U.S. 219, 1911.)"

"An impossible burden of proof is placed upon the Department in such cases.... Great quantities of evidence must be sought in the pursuit of the will of the 'intent'."

The report of the Department of Justice, however

in 1938 places blame not so much on judicial limitation of the statutes, as on the insufficiency of personnel and money allotted for enforcement.¹ Thus it was pointed out that during the famous Roosevelt "trust-busting" era, the Anti-trust Division consisted of only five lawyers and four stenographers. The present Anti-Trust Division has only 97 lawyers and has to handle 30 major acts of Congress. Thus when the Aluminum case prosecution involves the full time of ten attorneys, and with eight lawyers devoting their exclusive attention to the oil case, it is pointed out that it is a practical impossibility for the Division to handle or even investigate all complaints intelligently.

The function of the Department should be that of referee, it is maintained, in the hard fought game of competition, where infringement of the rules should be regarded as over-aggressiveness rather than immorality, with the Department policing the field of competition to ensure that the rules of fair competition be maintained.

The note in common with the reports in the past few years is the attack on "price rigidity", whereby production and not prices have been cut.

"Thus: (Thurman Arnold, May 1938) "...We have charged the Aluminum Company of America, with substantially complete monopoly control of the domestic source of raw material, coupled with practices which consolidate that monopoly. The result in terms of prices is this--using 1926 as a base-- aluminum prices receded from a high of 100 in 1926 to 84.9 in 1931-1933, a decline in the depth of depression of only 15 percent. Meanwhile to cite another metal, copper prices had dropped from 100 in 1926 to 40.3 in 1930, a decline of 60 percent; or four times the

1. Report of Assistant Attorney General Thurman Arnold, Report of Attorney General, year ending June 30, 1938, pgs. 54-69.

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reference, it is explained, in the more complex cases of
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few years is the attack on "public utility", whereby a
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"Times" (Thames Article, May 1935) "... We have
charged the Aluminum Company of America, with monopolizing
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materials, and with practices which constitute a
monopoly. The result in terms of prices is this--
1935 as a base--aluminum prices rose from a high of
100 in 1925 to 24.5 in 1935, a decline in the price
of aluminum of only 15 percent. In 1935, the price
of other metal, copper prices had fallen from 1925 to
40.7 in 1935, a decline of 50 percent; on four times the

decline in aluminum prices. The entire combined whole-sale index dropped 35 percent during the same period--more than twice the decline in aluminum.

"Again, in September, 1937, Government invitations for bids on ... tires resulted in an identical price of \$8.11 from all bidders. Investigation was instituted by the Department of Justice...When new bids were taken by the Government, a remarkable change had taken place. Instead of being identical, the bids were competitive. Instead of \$8.11 the low was now \$4.75. In the mean time public prices had not substantially varied.¹

In the same way, the same official points out that "price of steel for building supplies is higher by \$7.00 a ton in the midst of the present recession, than it was in 1929. Partly as a result of these prices, the industry is operating today at 25 percent capacity... The shock of the business recession is not reflected in reduced prices, but pay rolls have declined 55 percent during the past year."²

The 1937 Report of the Department of Justice pointed out that Government purchases offer the most favorable setting for the appearance of competition, if such exists, since purchases are made only on the basis of secret competitive bids. Certain examples were quoted:

"in Denver, among 17 bids for reinforcement bars, 14 were identical; in Los Angeles, among 12 bids (for the same article), 11 were identical; in bids on Navy steel pipes, there were 40 bids, each \$17,148.60."

Wide disparity was alleged between "least" and "most sensitive" prices. Thus farm prices, on the aggregate, fell 57 percent (grains fell 64 percent) within the depression since 1929; agricultural implements however, fell only 17 per-

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1. "Fair and Effective Use of Present Anti-trust Procedure, U.S. Law Review, pgs. 227-285.
 2. Thurman Arnold, "What is Monopoly"? Advertising Federation of America, June 15, 1938. (Vital Speeches July 1, 1938).

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The 1937 Report of the Department of Justice

pointed out that Government purchases after the war had pointed out for the exposure of competition. It each exists, since purchases are made only on the basis of secret competitive bids. Certain examples were quoted: "In Denver, among 17 bids for reinforcement bars, 14 were identical; in Los Angeles, among 15 bids for the same article, 11 were identical; in bids on heavy steel plates there were 40 bids, 36 were identical."

While discussing the alleged "fixing" and

"most sensitive" prices. These facts appear on the opposite, tell 27 percent (equals 10 percent) within the same period since 1929; agricultural implements however, fell only 15 per-

- 1. "Fair and Effective Use of Present Anti-trust Statutes," U.S. Law Review, Vol. 227-228.
2. "The American People," What is Monopoly? Advertising Edition of American, June 12, 1935. (Vital Speeches July 1, 1935).

cent at a maximum, while the price decline for most of the period involved was only 5-6 percent. Competitive manufacturing industries had to bear heavy declines, thus textiles-- cotton fell 50 percent, knit goods fell 53 percent, silks and rayons fell 75 percent; at the same time metal prices declined only 23 percent.¹

Conclusion

The lessening of price competition has been the problem of the enforcement agencies of the anti-trust laws, viz. the Federal Trade Commission and the Departments of Justice and Agriculture. The tendencies towards price leadership by dominant figures in an industry, sharing the market, stabilizing prices and the increased stress in non-price competition are all at variance with the traditional anti-trust policy.

Prior to the enactment of the N.R.A. codes this policy had been in general, an attempt to regulate business conduct by the so-called "external" method. This policy admittedly proved to be a failure, largely because of the necessity on the part of the administrators of the anti-trust laws to prove the existence of a state of mind on the part of a corporation, instead of merely proving that violation had taken place.

During the era of the National Recovery Act, in an attempt to revive business, the traditional "external"

1. Report, year ending 1937, op. cit.

...and as a result, while the price decline for most of the
period involved was only 5-6 percent, competitive manufacturing
and industries had to bear heavy losses, thus leading to
closure of 25 percent of the plants, 25 percent of the
and 25 percent of the plants; at the same time, the
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Conclusion

The intensification of price competition has been the
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viz. the Federal Trade Commission and the Department of
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and by dominant figures in the industry, leading the market,
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competition and all of variance with the competitive and anti-
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part of a corporation, instead of merely proving that
violation had taken place.

During the era of the National Recovery Act, in
an attempt to revive business, the "external" method

control was largely waived, and an "internal" control of business and industry by its own managers, under Governmental supervision was attempted. However, there is considerable question as to whether or not the program of internal control would not have broken down under its own weight, even if the Supreme Court had not intervened.

Moreover the problem of the administrative agencies has been further complicated by the Robinson-Patman and Miller-Tydings Acts, both of which tend to reduce price competition in an economic structure that has as its purpose furtherance of such competition.¹

Among the proposals for the bringing of order into the chaotic field, is the O'Mahoney-Borah proposal for the Federal licensing and regulation of corporations.² This bill, which carries criminal penalties, would prohibit corporations which acted in a monopolistic manner from receiving licenses. The power for revoking licenses for violation of the bills provisions would be centered solely in the courts.

The centripetal tendencies of American industry would seemingly have to be recognized by our Congressional committee now studying the trust problem, if anything permanent is to be accomplished. Reaction against the "killing

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1. The Attorney General's Report for 1938 recounts how 21 identical cement product bids were submitted in the State of Maryland, with one sole company making a lower bid, and receiving the contract. Soon after, a grand jury hearing was held in Baltimore, alleging violation of the Tydings-Miller Law by the low bidder. While the grand jury refused to indict, the Department points out the resulting confusion and apprehension in the cement industry.
 2. N.Y. Times, February 20, 1938.

control was largely waived, and an "interest" control of business was introduced by the Government, under Governmental supervision was suggested. However, there is considerable question as to whether or not the system of interest control would not have taken down under its own weight, even if the Supreme Court had not intervened.

Moreover the problem of the administrative agencies has been further complicated by the National-Formal and Miller-Tydings Acts, both of which tend to reduce price competition in an economic structure that has as its purpose the maintenance of such competition.

Among the proposals for the regulation of order into the classic field, is the O'Keefe-Born proposal for the Federal licensing and regulation of corporations. This bill, which carries criminal penalties, would prohibit corporations which acted as a monopolistic power from receiving licenses. The power for revoking licenses for violation of the bill's provisions would be conferred solely in the courts.

The congressional tendencies of American industry would seemingly have to be recognized by our Congressmen, committee not raising the same problem, it existing here, is to be accomplished. Reaction against the "killing"

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2. N.Y. Times, February 20, 1934.

pace of competition" is today so strong that some measure of governmental approval of and sanctions for this tendency innate in business. The steps which may well eventuate may be the setting up of administrative bodies, along the lines of the various industries, thus for example, the bodies set up under the Fair Labor Standards Act of 1938. Thus with picked bodies to represent the various interested bodies including the consumer, general objectives and standards might be marked out, with the power of governmental sanction to act as police power, always subject, of course, to judicial review, in order to prevent potential abuse.

case of competition, in order to bring that case before
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